

# EU Industrial Policy in a Globalised World – Effects on the Single Market



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# Preface

The current coronavirus pandemic has profound effects on health and economy. As a response to the crisis, EU budget rules have been relaxed and state aid rules are currently suspended. Member States have been urged to use foreign direct investment screening to avoid “predatory buying” of companies by non-EU actors in times of economic vulnerability. At present it is unclear when and how Europe will return to normal and what policy fields that may be most affected and – possibly – subject to change. It is, however, clear that the current crisis has given rise to additional political interest being directed towards the EU’s industrial policy.

In this anthology, we seek to deepen the understanding of the relationship between industrial policy and some essential parts of the Single Market. This anthology explores the context in which the New Industrial Strategy for Europe can be understood and discusses the interaction between the rules and principles of the Single Market and EU industrial policy. The contributions analyse the legal instruments that govern central areas of the Single Market: general competition law, state aid, public procurement, and European company law in relation to the screening of foreign direct investments. One key take-away is that the geo-economic pressures require the EU to take actions while at the same time consider the proper functioning of the Single Market.

We hope that this anthology can contribute to a better understanding regarding the relationship between industrial policy and the existing legal toolbox in some relevant areas of competition law and stimulate further discussions about the challenges and choices facing the EU Single Market and Europe in a new global context.

Göran von Sydow  
Director

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# Executive summaries

## **The New Industrial Strategy for Europe**

by Katarina Engberg

The EU prides itself on being a regulatory power. Acquiescing to its rules has been the necessary price to pay for outsiders if they wished to access its large and wealthy Single Market. The assumption was that the EU would set the global gold standard to which the rest of the world had to adjust. It has by and large been a successful strategy. But what if the world no longer adjusts to EU terms? The geo-economic competition between the US and China favours economic nationalism at the expense of multilateralism. State capitalist China, with deep financial pockets, can subsidize bidding with distortive effects on the Single Market and strives to set its own terms in global markets. Europeans themselves may not have done enough to promote productivity and innovation to stay the course in a more competitive world where the economic centre is shifting from the West to Asia. In addition, climate change and digitalisation are causing dramatic economic and societal transformations.

It is against these challenges that the European Commission has presented its New Industrial Strategy for Europe. The stated aim of the Strategy is that the EU shall shape, but not be shaped, by developments. The tone is urgent. The EU is said to have only five years to defend its economic sovereignty, defined as the need to affirm its voice, uphold its values and fight for a global level playing field. Defining the right mix of offensive and defensive measures is central to the endeavour. The goal is to create a globally competitive and world-leading industry that paves the way for climate neutrality and shapes Europe's digital future. The Single Market is said to be the EU's prime asset in a struggle described in heroic terms.

## **EU industrial policy and the rules and principles of the Single Market**

by Maria Wiberg

In its attempt to promote Europe's competitiveness and role on the global stage through an assertive industrial policy, the EU needs to strike a balance between this ambition and securing a proper functioning of the Single Market, considering that the two may go in opposite directions. The Single Market is founded on the idea of free movement and free and fair competition, providing for a level playing field in which all competitors, irrespective of their size or financial strength, follow the same rules and have equal opportunities to compete.

In contrast, industrial policy indicates intervention through government policies that attempt to improve the business environment by altering the structure of economic activity in favour of sectors, technologies or tasks offering better prospects for economic growth than others. The Single Market rules and principles give some room for adjustments aiming at striking a balance between promoting Europe's competitiveness and securing the proper functioning of the Single Market. This may however only be done by reference to the protection of for example public policy, health or security, related to the specifics in each legal area, but not by reference to purely economic considerations.

Still, the most demanding challenge will be to secure a common understanding of the purpose and the wider context of the EU's industrial policy. Without a common understanding, as well as coordination and knowledge within all local, regional, national and EU authorities and institutions, the strategy risks being ineffective and losing support. In this sense industrial policy aims at promoting the competitiveness of European enterprises and the EU's role on the global stage.

## **Should Competition Law promote competition or competitiveness?**

by Vladimir Bastidas Venegas

This contribution addresses the intersection between EU competition law and EU industrial policy. While EU industrial policy and EU competition rules in general pursue the goal of increasing the competitiveness of European industry, there is a potential tension between the application of competition law and the achievement of the goals pursued with EU Industrial policy. The underenforcement of competition law may not incentivize companies sufficiently to improve their performance to compete successfully in global markets and suppress new competitors and innovation. The overenforcement of competition law may, on the other hand, obstruct the improvements by companies in terms of efficiencies and competitiveness, thus counteracting the goals of industrial policy. The main conclusion drawn is that it appears unlikely that the current enforcement of competition law would seriously hold back the competitiveness of European industry. Instead, it seems that the main problem is the underenforcement of competition rules in digital markets. This issue, however, does not lend support for the consideration of policies that are external to the competition rules when enforcing those rules in digital markets. Rather, the problem could be solved by recalibrating the interpretation of the competition rules. The only instance where an explicit balance between protection of competition and external policies may become relevant concerns the involvement of third-country, state-controlled companies in merger transactions. However, as regards this particular issue, this analysis has found that the tools to remedy the problem are already in place.

## **The EU state aid ban – a straitjacket for a successful European industrial policy?**

by Jörgen Hettne

The European Union has been entrusted with rather weak powers as regards industrial policy. On top of this, its Member States are prevented from pursuing a national industrial policy with monetary elements as this may distort competition within the EU internal market. At the same time, European companies compete in the global market with state-supported companies from other economically strong regions of the world, including China, Japan and the US. The EU's current successful internal market paradigm, with its state aid prohibition, could therefore become an obstacle internationally.

This contribution argues that the EU presently suffers from a competence mismatch – the absence of a coherent European industrial policy – which risks making European companies weak globally. While Member States presently are making use of the relaxed state aid rules in order to guarantee liquidity for all companies heavily affected by the economic fallout of the Covid-19 outbreak, the adoption of a sustainable strategy in the long term is more important than ever. The EU would benefit from an industrial policy which is adaptive to geopolitical changes in the world, such as the Chinese Belt and Road Initiative and the present US mercantilist approach to trade policy as well as Brexit. A more aggressive European industrial policy might be needed at times when the rule-based international trade system is not working. If there is no global level playing field, trade strategies have to adapt to new realities.

## **EU and public procurement: making better use of the existing toolbox**

by Marta Andhov

Nearly 85% of the EU's public procurement market is open to third country bidders. Many European businesses, although they face third country competition in the internal market, cannot access procurement markets overseas. As a result of the increasing competition from third country suppliers, which is believed to create an uneven playing field in the internal market, the Commission has issued guidance on the participation of third country bidders in the EU procurement market. To ensure a fair and level playing field, the Commission promotes two approaches: first, the wider application of the available instruments in EU public procurement law (sustainable public procurement and abnormally low tender rules), to ensure that the same, or equivalent, requirements apply to both EU and third country suppliers, and, second, the introduction of the reciprocity regulation (the "International Procurement Instrument", or IPI). If the IPI is introduced, the rules that apply to EU businesses will be different from those that apply to businesses from third states.

This contribution concludes that, since 2012, the political will amongst Member States has not been strong enough to approve the IPI. However, the existing EU public procurement rules allow the playing field between EU and third country suppliers in the internal market to be made level. Nonetheless, the political will, the required skillset and capacity within the public sector are necessary.

### **Harmonisation of company law at EU level as an effective and complementary instrument for screening foreign direct investments**

by Thomas Papadopoulos

European Company Law could play an effective, but complementary, role in investment screening through various harmonisation measures within the European Union (EU). Those harmonisation measures establish instruments that could assist in defining and evaluating the identity and intentions of a foreign investor acquiring corporate control or even a portfolio investment in a company established within the EU. Such EU harmonisation measures must be implemented on a mandatory basis by all Member States, whereby they will be available in those Member States that have chosen not to utilise a special system for screening foreign direct investments. In those Member States that have a sophisticated system of screening foreign direct investments, however, they will operate complementary to the screening system and enhance it by providing additional information. Generally, the instruments capable of screening foreign direct investments are addressed to EU companies and their stakeholders. However, sometimes they also give powers to national supervisory authorities of the Member States, which could block certain corporate procedures and actions. The focus of this analysis is on EU companies controlled by a foreign (non-EU or third-party country) investor that benefits from the freedom of establishment.

# 1 The New Industrial Strategy for Europe

*Katarina Engberg*

## 1.1 Introduction

The EU's New Industrial Strategy for Europe<sup>1</sup> constitutes one of several examples of a renewed global interest in industrial policy.<sup>2</sup> According to the Strategy, subsequent initiatives and decisions will be introduced during the coming years. Proposals encompass a vast panoply of policies related to what more properly could be called growth and innovation policies, rather than traditional industrial policy, which evokes protectionism. The meshing of products and services in the digital era represented another reason to think anew.<sup>3</sup>

The political rationale for the EU's New Industrial Strategy is the professed need to defend European sovereignty in a more contested world. The EU should become a geopolitical power while reassuring its citizens of protection.<sup>4</sup>

According to the Strategy, changing power relationships have given rise to geo-economic competition between the US and China, stimulating nationalism at the expense of the multilateral system. Or, as described in a convoluted manner by the Strategy: "New powers and competitors are emerging. More established partners are choosing new paths". In its China strategy for 2019,<sup>5</sup> the EU had, for the first time, defined China as a systemic rival systematically picking up European technology and intellectual property (IP), investing in EU critical

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<sup>1</sup> European Commission (2020). *A New Industrial Strategy for Europe*. [https://ec.europa.eu/info/sites/info/files/communication-eu-industrial-strategy-march-2020\\_en.pdf](https://ec.europa.eu/info/sites/info/files/communication-eu-industrial-strategy-march-2020_en.pdf)

<sup>2</sup> Aiginger, Karl and Rodrik, Dani (2019). *The Rebirth of Industrial Policy: Reasons and Open Questions*. Journal of Industry, Competition and Trade. Springer.

<sup>3</sup> "Value creation and innovation increasingly take place at their intersection between goods and service markets, as business-related services become decisive in making products attractive to the consumer, while also generating most of the value added in growth and employment. Traditional industrial value chains are being flouted as a new generation of economic actors – technology-intensive, data-driven firms – are moving into industrial markets and creating those of the future. Around the globe, traditionally strong industries are losing out to tech start-ups. Although this phenomenon is common around the world, the emerging champions of this competition tend not to be European, but rather American and, increasingly, Chinese." *EU Industrial Policy after Siemens-Alstom. Finding a new balance between openness and protection*. European Political Strategy Centre (2019). [https://ec.europa.eu/epsc/publications/other-publications/eu-industrial-policy-after-siemens-alstom\\_en](https://ec.europa.eu/epsc/publications/other-publications/eu-industrial-policy-after-siemens-alstom_en)

<sup>4</sup> For an example of the rationale, see European Commission (2017). *Reflection Paper on Harnessing Globalisation*. [https://ec.europa.eu/commission/sites/beta-political/files/reflection-paper-globalisation\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/reflection-paper-globalisation_en.pdf)

<sup>5</sup> European Commission and HR/VP contribution to the European Council. *EU-China – a strategic outlook* (2019). <https://ec.europa.eu/commission/sites/beta-political/files/communication-eu-china-a-strategic-outlook.pdf>

infrastructure and creating institutional fora for dialogue with selected Member States. A direct spillover of proposals from the China strategy can be noted in the New Industrial Strategy.<sup>6</sup>

The EU's deliberations occurred against the backdrop of a global debate about the benefits and drawbacks of decades of rapid globalisation. Politically, a backlash against perceived negative aspects of globalisation has been noted in EU Member States, feeding discontent and populism. The disruption of global value chains resulting from trade wars and the coronavirus (Covid-19) pandemic seemed to unravel globalisation, or at least elements of it, while globalisation continued apace in other areas. Technological change in the form of digitalisation, the growing importance in a service economy to be closer to the customer and rising labour costs in China were all examples of forces contributing to what was sometimes described as a rebalancing of the global economy.<sup>7</sup>

While the jury was still out regarding the proper assessment of the fate and nature of globalisation, the need to adjust policies and instruments reverberated throughout the Strategy. Ideally, many of the issues, for example, digitalisation and the rise of China, should have been dealt with by the World Trade Organisation (WTO) but the erosion of the multilateral system reinforced the sense that the Europeans would have to rely increasingly on themselves.<sup>8</sup>

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<sup>6</sup> Anu Bradford in her book *The Brussels Effect. How the European Union rules the world* (2020). Oxford University Press argues that Europe's combination of size and affluence makes its consumer market one that few companies would choose to forgo. It is also the world's second-largest importer of goods. As a result, for many companies, the benefits of market access outweigh the cost of adjusting to the EU's stringent standards. The fear of shrinking multilateralism is not a cause for alarm either. Countries may retreat from security and trade arrangements or even leave the EU. But these antiglobalist stances will not undermine the global regulations that the EU produces. The Commission is less sanguine, stating that China's stance towards international standards have changed from adoption to shaping. The Belt and Road Initiative is envisaged as a vehicle to promote or even impose Chinese standards in third countries, also with a view to locking in future markets. Chinese companies are active in the International Communication Union (ITU), the International Organisation for Standardisation (IOS) and the International Electronic Commission (IEC). China's Huawei is setting global 5G standards, including in European platforms like the Third-Generation Partnership Project (3GPP) or the European Telecommunications Standards Institute (ETSI) through the memberships of its European branches. (*EU Industrial Policy after Siemens-Alstom. Finding a new balance between openness and protection*. European Political Strategy Centre, 2019.) [https://wayback.archive-it.org/12090/20191129080834/https://ec.europa.eu/epsr/publications/other-publications/eu-industrial-policy-after-siemens-alstom\\_en](https://wayback.archive-it.org/12090/20191129080834/https://ec.europa.eu/epsr/publications/other-publications/eu-industrial-policy-after-siemens-alstom_en)

<sup>7</sup> As argued by Dani Rodrik: <https://drodrik.scholar.harvard.edu/publications/rebalancing-globalization> For an example of the many analyses on the nature of globalization, see: McKinsey Global Institute (2019). *Globalisation in transition: the future of trade and value chains*. The study identifies five structural changes to global value chains: 1) Goods-producing value chains have grown less trade-intensive; 2) services play a growing and undervalued role in global value chains; 3) trade based on labor-cost arbitrage is declining in some value chains; 4) global value chains are growing more knowledge-intensive. <https://www.mckinsey.com/featured-insights/innovation-and-growth/globalization-in-transition-the-future-of-trade-and-value-chains>

<sup>8</sup> European Commission (2018). *WTO modernisation – introduction to future EU proposals* [https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc\\_157331.pdf](https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf)

## 1.2 The level playing field

The Single Market was described in the Strategy as the EU's prime asset in affirming European economic sovereignty. Central to the endeavour was the stated need to establish a global level playing field. The phrase borrows from a sports metaphor, meaning that the same sets of rules should be applied to both teams on the respective sides of the dividing line. Many EU competition laws and policies aim to remove distorting barriers and to create a level playing field in the Single Market so that all actors can compete on the same conditions and, consequently, also become competitive in the global market. While this has been perceived primarily in terms of the internal context, the emergence of American tech oligopolies and state-subsidized foreign actors was perceived to have changed the terms of the deal.

The Alstom-Siemens case had in 2019 highlighted the dilemma of setting internal conditions that also take external factors into account. The French and German companies had argued for a merger that would allow them to create a European Champion that could compete with Chinese companies. The Commission struck down the deal, pointing to the need for coherent anti-trust rules applied to both American tech companies and European firms operating in the Single Market. In addition, no credible Chinese competitors in the form of the Chinese state-owned rail enterprises CRSC and CRRC were said to be in sight. Instead, a merger could have weakened internal competition, ultimately affecting EU consumers negatively. The decision counts among the few – nine altogether – negative merger rulings made by the Commission, while 3.000 have been approved. The case exposed, nevertheless, the fungibility of the concept of “the relevant market” against which merger decisions should be measured. Should only the internal market be taken into account, or should external conditions also apply?

A renaissance of the Single Market was perceived as an important instrument for ensuring that the EU remained globally competitive. The presentation of the New Industrial Strategy was therefore accompanied by the adoption of the Single Market Enforcement Action Plan and the Single Market Barriers Report, both focusing on the removal of obstacles to competition in the Single Market. The creation of a Single Market Enforcement Task indicated the need to reinforce the EU's institutional capability to transform law into practice.

The Strategy pointed to the need to ensure that the competition rule remains suited to a fast-changing world and to a time when Europe is embarking on major transitions caused by climate change and digitalisation. The potential for increasing concentration levels in a digitalised economy were part of the concerns. Anti-trust remedies, rules governing horizontal and vertical agreements, the market definition, merger control and the “fitness” of various State aid guidelines were all indicated as examples of objects for study. Revised State aid rules were announced for 2021.

### 1.3 An instrument on foreign subsidies

While concerned voices had been raised by Member States in the debate regarding a potentially broader interpretation of state aid rules in the Single Market, there seemed to be more of an openness towards regulating conditions for investments made by state-subsidized foreign bidders. In a catch phrase indicative of the sober mood characterizing the EU's view of China, the EU was urged not to be naïve to threats to fair competition and trade.<sup>9</sup> This marked a sharp change from the generally positive view of globalisation and subsequent benefits of accessing the growing Chinese market that had characterized the first decade of the 2000s.

The perceived Chinese thefts of western IP and impediments to western access to the Chinese market had been part of the conversation for some time, but massive Chinese foreign direct investments (FDI) in the EU (peaking in 2016 at Euro 37.2 bn) and the acquisition of critical technology had raised the alarm.<sup>10</sup> Chinese prowess resulted from growing Chinese economic muscle, inflated by over-production. The ambition had been spelled out as a strategy in the document “Made in China 2025”. The blurring of the public (including the role of the Chinese Communist Party) and private sectors contrasted with western market economies. Chinese tenders, subsidised by the deep pockets of the Chinese state, enabled Chinese bidders to overpay others in the Single Market. The Chinese acquisition in 2016 of the German company Kuka, a proud example of the so-called German Mittelstand comprising small and medium-sized, high-performing companies, represented a salient case. While Chinese investments were said to still be welcomed, the need to better review Chinese bids resulted in calls for the sharpening of relevant EU tools – for example, its public procurement market rules – to allow for a more thorough examination of the role of foreign bidders.

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<sup>9</sup> According to *Financial Times*, a Dutch proposal envisages the creation of a sixth branch of EU competition law that would allow authorities to act if a company from anywhere in the world were to distort or threaten competition in the internal market because of support from its home government. The Commission could conduct investigations into a company's conduct and force the firm to be more transparent in its bookkeeping or prohibit certain behaviour, such as charging artificially low prices or pursuing takeovers that are not genuinely profitable. (Fleming, Tim and Espinoza, Javier (2019). Brussels urged reining in state-backed foreign rivals. *Financial Times*, 4 December.) <https://www.ft.com/content/f1ef1896-15fa-11ea-9ee4-11f260415385>

<sup>10</sup> Rhodium Group and Mercator Institute for China Studies (2019). *Chinese FDI in Europe: 2018 trends and impact of new screening policies*, 30 March 2019. <https://rhg.com/research/chinese-fdi-in-europe-2019-update/> The US had already updated its Cold War mechanism, the Committee on Foreign Investment in the United States (CFIUS) through the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA). The intention was to address national security concerns more effectively, including broadening the authorities of the President and CFIUS to review and to take action to address any national security concerns arising from certain non-controlling investments and real estate transactions involving foreign persons. <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius>.

In the New Industrial Strategy, a White Paper on an Instrument on Foreign Subsidies was presented in June 2020,<sup>11</sup> to be followed by a legal instrument in 2021. The stated purpose was to address distortive effects caused by foreign subsidies within the Single Market and to strengthen anti-subsidy mechanisms and tools.

#### 1.4 A screening mechanism

Massive Chinese investments in EU critical infrastructures such as electricity grids, transport infrastructure and communication networks caused concern and initiated a discussion on the need for defensive measures.<sup>12</sup> The EU felt a need to establish a mechanism for reviewing and potentially negating such investments with the aim of safeguarding Europe's interests on the grounds of security and public order. The FDI Screening Regulation (Regulation (EU) 2019/452) states that Member States and the Commission may:

[...] consider all relevant factors, including the effects on infrastructure, technologies (including key enabling technologies) and inputs that are essential for security or the maintenance of public order, the disruption, failure, loss or destruction of which would have significant impact in a Member State or in the Union.<sup>13</sup>

The screening mechanism will be based on harmonised rules that can facilitate a joint assessment by the Commission and Member States of potentially nefarious bids, while leaving the ultimate decision to Member States. The Commission may issue recommendations to Member States when there is a risk that the investment can affect projects and programmes of Union interest. The exact division of labour between the Commission and Member States remained to be established. Some voices were initially raised against the danger of the instrument being used as a pretext for protectionism.<sup>14</sup> The framework for the screening of foreign direct investment would be put in place in October 2020, and the Commission announced its intention to put forward new proposals for strengthening the mechanism in the Strategy. The coronavirus crisis did, however, provide urgency to the matter. An alleged US attempt at acquiring the German medical firm CureVac, producing a potential coronavirus vaccine, was said to have been halted after direct intervention by the German government

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<sup>11</sup> Commission White Paper on levelling the playing field as regards foreign subsidies, COM(2020) 253 final.

<sup>12</sup> Seaman, John, Huotari, Mikko and Otero-Iglesias, Miguel (2017). *Chinese investment in Europe. A country level approach*. Report by the European Think-tank network on China (ETNC). <https://www.ifri.org/en/>

<sup>13</sup> Official Journal of the European Union. LI 7971 Regulation (EU) 2019/452 of the European Parliament and the Council of 19<sup>th</sup> March establishing a framework for the screening of foreign direct investment into the Union. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019R0452>

<sup>14</sup> Wise, Peter (2019). Portugal raises Rmb2bn from 'Panda bond' sale. *Financial Times*, 30 May. <https://www.ft.com/content/d287ed46-82e0-11e9-9935-ad75bb96c849>

and the Commission that had promised a multimillion-euro investment in the company as part of its effort to stem the spread of the virus.<sup>15</sup>

On 25 March 2020, the Commission issued a Communication with guidance to Member States ahead of the application of the FDI Screening Regulation.<sup>16</sup> It urged Member States to be vigilant about preventing the health crisis from resulting in a sell-off of Europe's business and industrial actors. At the core were concerns regarding healthcare medical or protective equipment and related research establishments. Furthermore, the Communication emphasized that the undervaluation of European stocks posed a risk to broader sets of strategic assets crucial to the EU's recovery. The possibility of restricting capital movement was evoked in cases of "predatory buying" by foreign investors of companies with valuations well below their true or intrinsic value.

The Commission urged the 14 Member States already equipped with FDI screening mechanisms to make full use of them and those not yet equipped with such a mechanism to speed up their establishment. The Commission reminded Member States of the interdependencies existing in the integrated market and urged them to seek advice and coordination in cases where foreign investments could have an effect on the Single Market. In addition, the Commission highlighted the consequences of foreign investment in EU undertakings that have received funding under the EU Research and Innovation programme Horizon 2020, in particular projects related to the health sector, including future projects in response to Covid-19. The Commission stated its intention to follow developments on the ground, including with Member States.

To Sweden, the potential hiring in 2016 by Nord Stream 2 of the Gotland port of Slite had revealed the lack of regulation of FDI in Swedish critical infrastructure. It prompted the Swedish Government in August 2019 to establish a review of possible ways of establishing a national screening mechanism and to assess consequences of the EU's regulation in the field. A preliminary report considering the latter aspect was presented to the government on 6 March 2020, with the final report planned for 2 November 2021.<sup>17</sup> The Swedish Government professed its readiness to consider interim legislation that would allow authorities to intervene against predatory buying.

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<sup>15</sup> Rising, David and Mouslen, Geir (2020). EU funds firm developing virus vaccine amid US interest. *Associated Press*, March 16. <https://www.usnews.com/news/business/articles/2020-03-16/german-virus-vaccine-firm-denies-us-made-takeover-offer>

<sup>16</sup> European Commission, Brussels (2020). Communication from the Commission, *Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation)*. [https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc\\_158676.pdf](https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158676.pdf)

<sup>17</sup> *Kompletterande bestämmelser till EU:s förordning om utländska direktinvesteringar*, SOU 2020:11. Delbetänkande av Direktinvesteringsutredningen Stockholm 2020. <https://www.regeringen.se/rattsliga-dokument/statens-offentliga-utredningar/2020/03/sou-202011/>

In a related development, one of the first initiatives by the Commissioner for the Internal Market, Thierry Breton, was the presentation of guidelines for FDI in the EU's 5G network in the form of the 5G for Europe Action Plan.<sup>18</sup> The Chinese company Huawei had been at the centre of the controversy.<sup>19</sup> The New Industrial Strategy indicated that there will be a Follow-up to the Communication 5G for Europe Action Plan and the Recommendation on cybersecurity of 5G networks.

### **1.5 The International Procurement Instrument (IPI)**

Closely related to the issue of distortive state-subsidized bidders in the Single Market was the perceived need to ensure reciprocal access to overseas markets, many of which are strongly protected. While this was most salient in the case of China with its large state-owned companies, many Asian markets were characterized by considerable amounts of state intervention. This was particularly true in the area of public procurement where there had been a steady increase in the number of discriminatory procurement measures.<sup>20</sup>

The longstanding proposal for the creation of an International Procurement Instrument (IPI) was seen by the Commission as essential for opening up foreign markets, but it had repeatedly been rebuffed by Member States concerned about the consequences in the form of a tit-for-tat of counterreactions that could reinforce tendencies towards the closing rather than the opening of markets.

The New Industrial Strategy suggested, nevertheless, swift agreement on the IPI as a means of gaining leverage in negotiations. According to the proposal, the Commission could initiate an investigation in cases of alleged restrictive or discriminatory measures against EU companies in foreign procurement markets. If suspicions are confirmed, the Commission can initiate consultations with the concerned state. If consultations fail, and after having reached an agreement with Member States, measures restricting the access to the European procurement market can be applied.

### **1.6 Important Projects of Common European Interest (IPCEI)**

The Treaty on the Functioning of the European Union codifies (Article 107(3) (b)) the creation of so-called Important Projects of Common European Interest (IPCEI), benefitting from a more flexible interpretation of the rules for state aid. They are intended to foster large-scale deployment of innovative technology in areas of market failure through the combination of public and private funding.

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<sup>18</sup> 5G for Europe Action Plan. <https://ec.europa.eu/digital-single-market/en/5g-europe-action-plan>

<sup>19</sup> Kristin Shi-Kupfer, Kristin and Ohlberg, Mareike (2019). *China's digital rise – challenges for Europe*. Mercator Institute for China Studies. [https://www.merics.org/sites/default/files/2019-04/MPOC\\_No.7\\_ChinasDigitalRise\\_web\\_final.pdf](https://www.merics.org/sites/default/files/2019-04/MPOC_No.7_ChinasDigitalRise_web_final.pdf)

<sup>20</sup> European Political Strategy Centre (2019). *EU industrial policy after Siemens-Alstom. Finding a new balance between openness and protection*. [https://wayback.archive-it.org/12090/20191129080834/https://ec.europa.eu/epsc/publications/other-publications/eu-industrial-policy-after-siemens-alstom\\_en](https://wayback.archive-it.org/12090/20191129080834/https://ec.europa.eu/epsc/publications/other-publications/eu-industrial-policy-after-siemens-alstom_en)

Emphasis has been put on areas where Europeans are underrepresented in global value chains and risk becoming dependent on external actors. Member States, representing both public and private interests, have been represented in the selection of projects, for example, in the form of the Strategic Forum on IPCEI. Some concerns were voiced by Member States regarding the risk of “picking winners” over competitive and viable innovations.

Current projects include microelectronics, central to Artificial Intelligence and edge computing, and the battery alliance that aims to stimulate the production of batteries for electric cars and thereby ease European dependence on China in this regard. Sweden has gained from the project through the €52.5 million loan put at the disposal of Northvolt and its European Battery Project by the European Investment Bank (EIB). It forms part of the EU’s Energy Demo Projects (EDP) Facility.

In 2021, revised State aid rules for IPCEI will be presented, according to the New Industrial Strategy.

### **1.7 Europe’s industrial and strategic autonomy**

The Strategy defines Europe’s strategic autonomy as reducing dependence on others for things needed most: critical materials and technologies, food, infrastructure, security and their strategic areas.

Among the many proposals is a new EU Pharmaceutical Strategy that addresses an area where European external dependencies have been laid bare by the outbreak of the coronavirus. The European Defence Fund (EDF), awaiting its resourcing from the Multiannual Financial Framework (MFF), represents another instrument for reinforcing the EU’s industrial autonomy. It followed a similar pattern as other projects where cooperation between several industrial actors and the combination of public and private financial resources would be gratified by access to EU funding.

The creation of a new Directorate-General for Defence Industry and Space (DG DEFIS) under the aegis of the Commissioner for the Internal Market, Thierry Breton, testified to the importance attached to the matter. Here, the inspiration was said to come from the American agency called the Defence Advanced Research Projects Agency (DARPA).<sup>21</sup> The EU’s space programs, the navigation system Galileo and Copernicus earth and observation satellites were cited as examples not only as important for reinforcing the EU’s industrial autonomy but also for the protection of its critical infrastructure.<sup>22</sup>

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<sup>21</sup> Defence Advanced Research Projects Agency (DARPA). <https://www.darpa.mil/>

<sup>22</sup> Directorate-General DEFIS, Defence Industry and Space. [https://ec.europa.eu/info/departments/defence-industry-and-space\\_en](https://ec.europa.eu/info/departments/defence-industry-and-space_en)

## 1.8 Governance

The Commission in the Strategy describes itself as an enabler and accelerator for change and innovation, providing platforms for Member States to join forces through public and private financing. The mix of representation from the Commission and Member States varies according to the division of competencies for the specific area. The Commission sees itself as a catalyst for cooperation between EU actors, for example, in the form of the Strategic Forum on IPCEI and the Industry 2030 High Level Industrial Roundtable. The Industrial Strategy proposed the creation in September 2020 of an Industrial Forum – comprising representatives from industry, social partners, researchers, Member States and EU institutions – to support the Commission in its work.

The Commission is, apart from an enabler and accelerator, also an enforcer when it comes to upholding competition in the Single Market, as testified by the Alstom-Siemens case. It can also soften the terms in case of need, as proven by the relaxation of state aid rules provoked by the coronavirus crisis. The proposals in the Strategy for the creation of a Single Market Enforcement Taskforce and a Chief Trade Government Officer indicate an increasing role for the Commission in enforcing and implementing the rules already in place.

As pointed out in the following papers, many tools for achieving goals laid out in the Strategy are already in place. One could possibly argue that the institutional capacity for using them needs to be strengthened, for example, in making full use of the existing procurement regulation. The reinforcement of the analytical capacity of the Commission Directorate-General for Competition (DG COMP) and the combination of competencies from different policy areas and Commission Director-Generals will likely be necessary to make well-founded decisions in the future.<sup>23</sup> New forms of rapid decision making seem to be another critical feature as digitalisation will speed up the pace of transactions. One could possibly expect more proposals regarding the need to reinforce the EU's institutional capacity to implement its New Industrial Strategy to be advanced in the future.<sup>24</sup>

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<sup>23</sup> As argued in the *Rapport de la politique de la concurrence et les intérêts stratégiques de l'UE*, Ministère de l'Économie et des Finances, Secrétariat d'État auprès du Ministre de l'Économie et des Finances, Inspection Générale des Finances, Conseil Général de l'économie, de l'industrie, de l'énergie et des technologies, April 2019. <http://www.igf.finances.gouv.fr/files/live/sites/igf/files/contributed/IGF%20internet/2.RapportsPublics/2019/2018-M-105-03-UE.pdf>

<sup>24</sup> For another example of the discussion on institutional implications, see Mark Leonard et al. *Securing Europe's economic sovereignty* (2019). Survival. Global Politics and Strategy. October-November 2019. The International Institute for Strategic Studies. London: Routledge.

# 2 EU industrial policy and the rules and principles of the Single Market

*Maria Wiberg*

## 2.1 Introduction

The Single Market aims to uphold and improve the economy and welfare of the societies of the EU and its Member States, as well as to stimulate jobs and to offer greater choices and lower prices for consumers. Its objective is to stimulate European enterprises to grow, innovate and become more competitive. However, the EU and its Single Market, which are founded on free movement and free and fair competition, are currently under pressure due to increasing geo-economic tensions. For many years, European industries have adjusted to the rules and principles of the Single Market, but new challenges arise when they are exposed to the added competition from international companies that play by different rules, for example from China and the US, as addressed by several of the authors in this volume.

But the foreign pressure on the European economy forms only part of the challenges that face the EU and its enterprises. In addition, there are more ongoing general transitions related to sustainability, rapid technological changes, and an unstable global trade environment. The latter is caused by the threat to the World Trade Organisation (WTO), constituting the core institution in the multilateral trading system, compounding growing trade tensions. Although one of the main functions of the WTO is to establish rules and principles for the good functioning of international trade, the “rulebook” is far from complete. Existing rules and the function of the institution itself have been questioned, and members call for reform.<sup>25</sup>

There is already an ongoing debate on the effectiveness of the Single Market and its legal framework in relation to undistorted competition in the globalisation era,<sup>26</sup> and some reports claim that European enterprises are losing in innovation and technology.<sup>27</sup> This prompted the European Council in its Conclusions from

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<sup>25</sup> EPRS, Bacian, I. and Vokovic, M., *Trade and competitiveness policies in the European Council Background, current developments and way forward* – European Council Oversight, March 2020, at p. 1, [https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/621812/EPRS\\_IDA\(2020\)621812\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/621812/EPRS_IDA(2020)621812_EN.pdf).

<sup>26</sup> Id., referring to the European Council’s concerns.

<sup>27</sup> See, for example, New EIB investment report: *EU risks losing ground on innovation to US and China*, <https://www.eib.org/en/press/all/2018-305-new-eib-investment-report-eu-risks-losing-ground-on-innovation-to-us-and-china.htm>.

March 2019<sup>28</sup> to state that the keys to Europe's prosperity and competitiveness, as well as its role on the global stage, are both the general deepening of the Single Market in all its dimensions and an assertive industrial policy.

However, recalling that the Single Market is founded on the idea of free and fair competition that provides for a level playing field<sup>29</sup> that gives everyone equal chances of succeeding,<sup>30</sup> an industrial policy may go in the opposite direction. Industrial policies often imply intervention by governments seeking to improve the business environment to alter the structure of economic activity towards sectors, technologies or tasks offering better prospects for economic growth than others.<sup>31</sup> In other words, the EU's objective to both secure the proper functioning of the Single Market and its ambition to give European enterprises the necessary tools to compete in the global arena through an assertive industrial policy may undermine each other.

This leads to the imminent question that is also the subject of discussion in this chapter: Is there a need to rebalance between the interest in securing the foundational rules and principles of the Single Market, on the one hand, and the interest in securing a place for European companies on the global stage, on the other hand? Are there tools within the EU legal framework that may be used to establish a harmonious balance between these two important interests?

In the following sections, the first describes the foundations of the Single Market and why its rules and principles may be at odds with an assertive industrial policy to secure the competitiveness of the EU. Furthermore, the need for an EU industrial policy is discussed, considering globalisation, sustainability challenges and the rapid technological changes. Secondly, the main objectives of the New Industrial Strategy for Europe launched by the Commission in March 2020 are set out. Thirdly, the interaction between the Single Market rules and principles and EU industrial strategy is illustrated in light of the development of the EU. Fourthly, considering the interaction between the Single Market and EU industrial policy, the need for a *harmonious and balanced* co-existence of the Single Market rules and principles with EU industrial policy is discussed. Finally, an overarching conclusion is presented.

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<sup>28</sup> European Council Conclusion, Brussels, 22 March 2019, EUCO 1/19.

<sup>29</sup> One definition may be found in the Business dictionary: <http://www.businessdictionary.com/definition/level-playing-field.html>, see also the discussion by Engberg, K., in this volume.

<sup>30</sup> See also the definition in Cambridge dictionary: <https://dictionary.cambridge.org/dictionary/english/a-level-playing-field>.

<sup>31</sup> Study for the ITRE Committee, European Parliament, Pellegrin, J., Letizia Giorgetti, M., Jensen, C. and Bologini, A., *EU Industrial Policy: Assessment of recent developments and recommendations for future policies*, DG for Internal Policies, February 2015, at p. 17 referring to Warwick, K. (2013), *Beyond Industrial Policy: Emerging Issues and New Trends*, OECD Science, Technology and Industry Policy Papers, No. 2, OECD Publishing.

## 2.2 The EU Single Market rules challenged

Throughout the years, the Single Market has fuelled economic growth within Europe by enabling goods, services, persons (establishments and workers) and capital to move freely and by securing free and undistorted competition. It has proven to be an effective instrument, despite different challenges over time,<sup>32</sup> for generating opportunities and economies of scale for European companies by strengthening their competitiveness, as well as by creating job opportunities and offering greater choices and lower prices for consumers.<sup>33</sup> However, as mentioned above, the good functioning of the Single Market is now being challenged by its exposure to additional pressure.<sup>34</sup>

### 2.2.1 Foundation of the Single Market in relation to free movement and competition

In its capacity as one of the main principles of the Single Market, the principle of non-discrimination is, among other things, to ensure that the best products and services may be sold at the best price, without consideration of their national origins. Furthermore, the principle also aims to secure the non-discrimination of establishments, workers and capital among the Member States within the EU. But the rules on free movement go even further than non-discrimination by also prohibiting all obstacles to transborder trade in products and services as well as to establishing a company, working and investing in another Member State. There is, however, some room for manoeuvre by the Member States since proportionate exemptions may be made in relation to public interests. This is to balance the effects of the broad scope of the prohibition of obstacles to free movement between the Member States. In other words, the rules are meant generally to facilitate free trade in products and also the possibility of establishing and effectively using services, labour and capital throughout the Union. Being able to effectively use all the economic resources throughout the EU, European enterprises have greater opportunities to grow and prosper.

However, at the same time, in order for the rules and principles of free movement to not be undermined by private parties, there are also rules preventing companies from merging, using their built-up strength or concluding agreements in a way which unjustifiably distort competition. Therefore, the Single Market rules on free and fair competition prohibit cartels, other restrictive agreements and abuse of a dominant position. Furthermore, rules on merger control have been

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<sup>32</sup> See below, section 4.

<sup>33</sup> As stated in, for example, the Single Market Strategy, 2015, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Upgrading the Single Market: more opportunities for people and business, COM(2015) 550.

<sup>34</sup> See, for example, New EIB investment report: EU risks losing ground on innovation to US and China, <https://www.eib.org/en/press/all/2018-305-new-eib-investment-report-eu-risks-losing-ground-on-innovation-to-us-and-china.htm>.

introduced.<sup>35</sup> In addition, the rules on state aid prohibit measures taken by the Member States to promote certain economic activities and activities of certain undertakings that have effects on the competitiveness of specific sectors or undertakings. These rules, similar to those that govern free movement, also allow for certain exemptions related to public interests and efficiency, if relevant and proportionate, as discussed more specifically in the other contributions of this volume.

In short, this means that all obstacles to trade that are introduced by the Member States as well as anti-competitive behaviour by undertakings or by the Member States are prohibited if they are not necessary for protecting public interests such as public policy, health or security. This also means that all enterprises conducting business within the Single Market are, on the one hand, *obliged* not to distort competition while they, on the other hand, are also *protected* from measures that would hinder their trade or expose them to anti-competitive behaviour, no matter whether they have their principal establishment within the EU or in a third country. The foundation is that once a product or service has been produced within or lawfully passed the external border of the EU, or a secondary establishment is legally established within the Single Market, that product, service or establishment should enjoy the level playing field of the EU.

In conclusion, the Single Market rules and principles in relation to free movement and free and fair competition are to remove all obstacles to trade between Member States and create a level playing field for all companies within the EU to create prosperity and growth. Nonetheless, they also provide some room for manoeuvre by the Member States and the EU to consider, for example, public interests and efficiency, although under strict requirements related to proportionality. For this reason, the EU has the competence, in accordance with the Treaty, to regulate the rules and principles of the Single Market, such as those in relation to non-discrimination, free movement, public procurement, competition, state aid and foreign direct investments.

### 2.2.2 The Single Market under pressure

However, this does not mean that there is a secured level playing field within the Single Market for EU companies in relation to those having their primary establishments in third countries. This is largely due to the fact that the pre-conditions for conducting business are different, depending on which market one operates from. Companies having their primary establishment in, for example, a state-capitalistic market may work under totally different premises and costs than companies established within the EU. Products and services that are manufactured in state-capitalistic markets may be more advanced, innovative

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<sup>35</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.1.2004, pp. 1–22.

and cheaper due to the presence of state aid, lower labour and company costs.<sup>36</sup> Companies that benefit from state aid, for example, may also have more resources and cheaper capital to invest in businesses that are established within the EU. Furthermore, just because the EU is open for business to be conducted on equal terms within the Single Market, no matter where a primary establishment is situated, this does not mean that third countries provide the same for EU companies when conducting business in their territories. As discussed by Marta Andhov in this volume, this creates a lack of reciprocity as regards, for example, public procurement, and in the long run, these kinds of factors put pressure generally on the EU market.

When European companies are exposed to competition by companies from third countries both within the Single Market and on the global stage, European companies risk being outrivalled, not merely on the grounds of being non-competitive but because competitors are playing by different sets of rules and conditions. The full function of the Single Market is to facilitate and help European enterprises to be innovative, grow and be competitive. Still, the challenges of increasing globalisation, sustainability and rapid technical development inevitably signal the need not only to push for a proper functioning of the Single Market but also for an assertive industrial policy at the EU level. However, at the time of writing, as mentioned above, it is not yet clear how the fundamental components of the Single Market can be fully enhanced and maintained if the EU should establish such an industrial policy at the same time. It needs to be recalled that the reason is that industrial policy generally requires state intervention in order to stimulate the economy, and active and selective policy measures could easily contradict the paradigm of the free and undistorted competition that upholds European cooperation today.

In conclusion, both the EU and its Member States need to recognise the fact that the EU must provide its companies not only with a properly functioning Single Market but also with effective tools in order to compete in the global arena. The question is how to strike the best balance between these two. In the absence of a global level playing field, i.e., reciprocity and mutual benefits in the global arena, the EU needs to take action to meet the external challenges to the foundation of the Single Market.

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<sup>36</sup> Measures may though, under certain circumstances, be imposed in relation to dumped imports, see Regulation (EU) 2016/1036 of the European Parliament and of the Council on protection against dumped imports from countries not members of the European Union OJ L 176, 30.6.2016, p. 21–54, and also in relation to subsidised imports, see Regulation (EU) 2016/1037 of the European Parliament and of the Council on protection against subsidised imports from countries not members of the European Union, OJ L 176, 30.6.2016, p. 55–91. See the latest report from the Commission, 38th Annual Report on the EU's Anti-Dumping, Anti-Subsidy and Safeguard activities and the Use of trade defence instruments by Third Countries targeting the EU in 2019, SWD(2020) 71.

## 2.3 The New Industrial Strategy for Europe

As mentioned above, the European Council Conclusions from March 2019 did not only call for the deepening of the Single Market but also for an assertive industrial policy for the EU. In response, the Commission launched a New Industrial Strategy in March 2020.<sup>37</sup> The strategy refers to the EU embarking on transitions towards both climate neutrality and digital leadership. The New Industrial Strategy emphasises that it is a time of moving geopolitical plates that affect the nature of competition; the EU needs to affirm its voice, uphold its values and fight for a level playing field, and it is also about Europe's sovereignty. Considering the wish to also establish, for example, strategic autonomy within the EU – in the sense of reducing dependence on others for things most needed: critical materials and technologies, food, infrastructure, security and their strategic areas,<sup>38</sup> it is of great importance to carefully balance the foundation of the Single Market against such wish. It is also underlined in the New Industrial Strategy that it should not end up in protectionism and distortion of competition within the Single Market.

The strategy states that new products, services, markets, business models and new types of jobs will emerge that will demand new skills. Furthermore, production goes from linear to circular, and there are geopolitical changes having immense effects on competition. The Commission looks for common solutions with the industries, social partners and other stakeholders focusing on industrial ecosystems, considering all players within a value chain. Competition, open markets, world-leading research and technologies and a strong Single Market that brings down barriers, resisting protectionism or market distortion while not being naïve in the face of unfair competition, are foundational for the shaping of the strategy. The Strategy builds on “three drivers” – a globally competitive and world-leading industry which paves the way to climate-neutrality and shapes Europe's digital future. In sum, the strategy further enhances the interactive approach, connecting all dimensions while also emphasising European sovereignty and autonomy.

Under seven headings, the strategy explains the plans for the most fundamental aspects of Europe's industrial transformation and measures. The Commission has or will adopt action plans, launch strategies and platforms, present a white paper and also evaluate, review and take initiatives to strengthen and adopt rules, etc. The explicit “promises” regarding legislation or the establishment of functions may be noted, for example, in the following:

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<sup>37</sup> Communication from the Commission, A new industrial strategy for Europe, 10 March 2020, COM(2020) 102 final.

<sup>38</sup> See Engberg, K., in this volume.

Under the first heading, the Commission concludes that it is “our unique single market”<sup>39</sup> that constitutes the springboard for EU companies to compete globally. Therefore, parallel to the Strategy, the Commission adopted “The Single Market Enforcement Action Plan”. In this Action Plan, it is, among other things, established that a joint Single Market Enforcement Task-Force (SMET) will be set up. SMET is to hold regular meetings to assess the state of compliance of national law with Single Market rules.<sup>40</sup> Furthermore, it is set out that rules related to both goods and services are to be revised as well as, if necessary, the rules on competition and state aid to be in place in 2021. It is also provided that a global level playing field must be upheld whereby the Commission by mid-2020 will address distortive effects caused by foreign subsidies within the Single Market in a White Paper on an Instrument on Foreign Subsidies, followed by a legal instrument in 2021 (how to best strengthen anti-subsidy mechanisms and tools, looking at foreign access to public procurement and EU funding). There will be a swift adoption of the International Procurement Instrument (IPI). A new Chief Trade Enforcement Officer will work to improve the compliance and enforcement of EU trade agreements and report to the European Parliament. The Commission will adopt an Action Plan on the Customs Union in 2020 to reinforce custom controls, including a legislative proposal for an EU Single Window allowing fully digital clearance processes at the border. There will be guidance on strategic (social, innovation, green) and other aspects (collusion) of public procurement and proposing a Recommendation on Review systems.<sup>41</sup> In addition, the 4<sup>th</sup> update of the Public Procurement Action Plan 2020<sup>42</sup> includes a series of new initiatives to help administrators and beneficiaries of EU funds improve their public procurement practices to ensure a level playing field and use procurement as a strategic tool to pursue key policy objectives.<sup>43</sup>

The explicit “promises” and “functions” to be established illustrate that the future design of actions and instruments set out in the New Industrial Strategy within the fields of competition law, state aid, public procurement and foreign direct investment, depending on how they are formulated, may have strong effects on the existing rules and principles of the Single Market. However, the Strategy does not present how these actions and instruments will look like in the end. The future effects on the proper functioning of the Single Market must in this respect be carefully balanced against the wish to create European sovereignty, establish strategic autonomy and global competitiveness.

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<sup>39</sup> Communication from the Commission, A new industrial strategy for Europe, op cit, p. 5.

<sup>40</sup> Communication from the Commission, Long term action plan for better implementation and enforcement of single market rules, 10 March 2020, COM(2020) 94 final, p. 4.

<sup>41</sup> Ibid., p. 6.

<sup>42</sup> Public Procurement Action Plan, In the context of the use of ESI Funds – 2013-2020, [https://ec.europa.eu/regional\\_policy/sources/docgener/informat/2014/action\\_plan\\_pp.pdf](https://ec.europa.eu/regional_policy/sources/docgener/informat/2014/action_plan_pp.pdf)

<sup>43</sup> Communication from the Commission, Long term action plan for better implementation and enforcement of single market rules, op cit, p. 8.

## Concrete actions set out in the New Industrial Strategy for Europe

1. *A deeper and more digital single market* – with reference to “the Single Market Enforcement Action Plan”,<sup>44</sup> setting up a Single Market Enforcement Task-force composed of the Member States and the Commission which are to strengthen the common efforts to see to that rules and principles of the Single Market are implemented and enforced: revision of the EU rules on product safety; adoption of the Digital Services Act; and evaluate, review and, if necessary, adopt EU competition rules and revise the state aid rules, to be in place in 2021 (the fitness of competition rules considering globalisation and digitalisation, merger control and the fitness of various state aid guidelines, improve case detection and speeding up investigations).
2. *Upholding a global level playing field* – by mid-2020, the Commission will address distortive effects caused by foreign subsidies within the Single Market in a White Paper on an Instrument on Foreign Subsidies, followed by a legal instrument in 2021 (how to best strengthen anti-subsidy mechanisms and tools, looking at foreign access to public procurement and EU funding). There will be a swift adoption of the International Procurement Instrument (IPI). A new Chief Trade Enforcement Officer will work to improve the compliance and enforcement of EU trade agreements and report to the European Parliament. An Action Plan on the Customs Union in 2020 will be adopted to reinforce custom controls, including a legislative proposal for an EU Single Window allowing fully digital clearance processes at the border.
3. *Climate neutrality* – the Commission will launch several strategies. A Common European Energy data space will exploit the potential of data to enhance the innovative capacity of the energy sector; and a review of the Trans-European Network Energy regulation; there will be a proposal for a Carbon Border Adjustment Mechanism in 2021, if differences in ambition around the world persist.
4. *Circular economy* – with reference to the Circular Economy Action Plan, introduce a new sustainable product policy framework, propose ways to improve consumer rights and protection, and measures to empower consumers to play a more active role in the circular economy. There will be a proposal for further legislation and guidance on green public purchasing.
5. *Industrial innovation* – under this heading, one may not find any promises of legislation regarding establishments of concrete functions (it is, however, mentioned that the European Innovation Council will be fully launched in 2021).
6. *Skilling and reskilling* – equally as in relation to *industrial innovation*, there are no foreseen legislative proposals or functions proposed under this heading.
7. *Investments and financing* – the Commission will put in place revised State aid rules for Important Projects of common European Interest (IPCEIs) and consider the scope for coordinated investments by Member States and industry in the form of new IPCEIs.

<sup>44</sup> Ibid.

## 2.4 Interaction between EU industrial policy and the rules and principles of the Single Market

EU and national industrial policy for market development and promotion of the competitiveness of EU companies,<sup>45</sup> as well as the Single Market rules and principles, have over the years evolved in interaction with each other. This is inevitable since the EU is founded on a close, comprehensive, and unique cooperation among Member States, all with the same ambition of creating a true Single Market for the nation states.

Before deepening the discussion on the interaction between EU industrial policy and the Single Market, some basics need to be recalled: While the EU Member States have conferred regulatory competence to the EU to establish the Single Market, they have, on the contrary, not conferred any powers to the EU for the detailed governance of sectorial and regional economic planning. In effect, the EU's industrial policy may come into conflict with the national sovereignty of the Member States if it becomes too intrusive in such planning of the Member States. This also applies in the opposite direction: The Member States cannot engage in national economic planning that risks distorting competition or hindering free movement, as discussed by Jörgen Hettne in this volume.

In the early days of the European cooperation, i.e., at the dawn of the establishment of the European Coal and Steel Community (ECSC) in the early 1950s,<sup>46</sup> the relationship between what was seen as national and a common industrial policy, on the one hand, and the creation of the common market, on the other, was different. The reason is that the early European economic cooperation between the six initial Member States was limited to establishing a common market in relation to the specified areas of the coal and steel industries. Due to the limited scope of the economic cooperation, the ECSC was given extensive powers to control the production of the two industries and to undertake long-term planning.<sup>47</sup> The High Authority (now the European Commission) could use interventionist instruments, including minimum prices, quotas and trade protection, in order to maintain an effective market.<sup>48</sup> As of today, mergers of companies had to be authorised in advance, and state aid and subsidies were prohibited.<sup>49</sup> This European past reveals that the Community once had the power to direct and control the industries covered by the common market at the time (a common market of coal and steel), and the integration process had

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<sup>45</sup> See the discussion by Hettne, J., in this volume.

<sup>46</sup> The Treaty establishing the European Coal and Steel Community, Paris, 18 April 1951.

<sup>47</sup> Baily, R. *The European Connection – Implications of EEC Membership*, Pergamon Press, Oxford, 1983, at p. 125.

<sup>48</sup> Study requested by the ITRE committee, European Parliament, by CSIL, University of Bari and CERPEM, University of Warsaw and EUROREG, (Pellegrin, J., Colnot, L., Prota, F., Ardizzon, F., Delpont, L., Capriati, M., Olechnicka, A., Smith, C.), *How to tackle challenges in a future-oriented EU industrial strategy?*, June 2019, p. 28.

<sup>49</sup> Articles 66 and 4 of the ECSC Treaty.

deep industrial roots. In addition, the Euratom Treaty signed in 1957 intended to introduce a common policy for the nuclear industry.<sup>50</sup>

However, since the aim of the European Economic Community (EEC), founded through the EEC Treaty also signed in 1957, was to establish a general common market covering all economic sectors instead of only a few sectors, as was the case with the ECSC and Euratom, the same approach was not used. With the EEC covering all economic sectors, providing the Community with the same extensive powers to control production and long-term planning, for instance, in relation to ECSC and the Euratom Treaties, would have had immense effects on the sovereignty of the Member States. Defining the principles on which economic policies should be formulated or what measures should be taken for their coordination became too difficult, whereas agreeing on which tariffs and other trade barriers should be removed was easier.<sup>51</sup> Therefore, the EEC Treaty provisions did not introduce, for example, regulating investments and financial assistance, production and prices.<sup>52</sup> The policy focus was instead generally on securing free trade, a common market and undistorted competition.

However, the approach of avoiding issues of investments, financial assistance, production and prices meant that the EEC Treaty did not remove the problem that the establishment of a common market and industrial policy issues are intertwined. This may be exemplified by the possible (non)adjustment of European companies to the common market. In the 1960s, there was a concern that many European companies did not seize the opportunities offered by the developments in the new common market, which in effect caused them to remain uncompetitive and small-sized.<sup>53</sup> In 1970, the Commission therefore made the first attempt to define a comprehensive programme for an industrial policy at the Community level.<sup>54</sup> The purpose of the programme was to stimulate a debate on an European policy on how to: i) unify the internal market; ii) encourage the Community to catch up in areas where it was technologically lagging; iii) organise and develop firms and industries on a European scale; and iv) ensure that community enterprises were able to compete fairly in other markets.<sup>55</sup>

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<sup>50</sup> Baily, op cit, at p. 125.

<sup>51</sup> Ibid., at p. 126.

<sup>52</sup> See chapters IV and V of the ECSC Treaty.

<sup>53</sup> Geroski, P. A. *European Industrial Policy and Industrial Policy in Europe*, Oxford Review of Economic Policy, Volume 5, Issue 2, 1 July 1989, pp. 20–36, at p. 27 and Commission memorandum on an industrial policy, COM (70) 100 (the Colonna Report), 18 March 1970, Bulletin of the European Communities, Supplement 4/70; see the discussion in the introduction in the Memorandum by H.E. Guido Colonna di Paliano.

<sup>54</sup> The Colonna Report, op cit.

<sup>55</sup> Geroski, op cit, at p. 27.

Yet, the actual focus and solution of the Community's industrial policy at the time was still to open up the common market and create incentives for companies and industries to grow and become competitive on the basis of free movement and undistorted competition. But at the same time, several states were in the process of transforming their domestic industrial policy in order to handle different economic crises. Many states were burdened by unstable prices in oil and raw materials as well as by endless worker conflicts.<sup>56</sup> The national industrial policies of the Member States remained mainly sectorial,<sup>57</sup> while the reaction from the community was to try to bring pan-European coherence in relation to the different national industrial policies in the different sectors.<sup>58</sup> This could be accomplished by detailed harmonisation of technical rules.<sup>59</sup> Due to the distribution of regulatory powers of the Community at the time, the Community policy had varying effects on different sectors.

Under the ECSC Treaty, the Community had extensive regulatory powers in relation to the steel sector why it could still provide an assertive policy in this sector. This policy was generally viewed as a success. Yet this policy could be questioned, since the measures imposed on the steel industry had very uneven effects on local, regional and national levels. By contrast, in sectors falling under the scope of the EEC Treaty, where the Community did not have any direct regulatory powers over the industry, actions were often hindered not by the Community policy but rather by the EC competition rules. Uneven adjustment was thereby a non-issue; instead, it was difficult to handle problems with market growth slowing down, which could not easily be matched by, for example, capacity reduction due to national policies and Community competition rules.<sup>60</sup> Other initiatives employed by the Community to steer the market were, for example, the setting of standards and programmes for research and development in specified sectors. Standardisation in the high technology sector helped reduce uncertainty about product specifications and ensured the compatibility of different components in complex systems (promoting the value chains within the Community), whereby standards provided for efficiency. In the high-tech sector, strategic programmes for research and development were also introduced, for example, a joint Community-private sector programme in which larger European

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<sup>56</sup> Bianchi, P. and Sandrine, L., *Economic Crisis and Industrial Policy*, Revue d'économie industrielle, pp. 29–130, at para. 34.

<sup>57</sup> Study for the ITRE Committee, European Parliament, *EU Industrial Policy: Assessment of Recent Developments and Recommendations for Future Policies*, 2015, op cit, at p. 25.

<sup>58</sup> Geroski, op cit, at p. 27.

<sup>59</sup> Wiberg, M., *The EU Services Directive – Law or Simply Policy?* Erlanders Sverige, 2013, pp. 261–262.

<sup>60</sup> See the reasoning by Geroski, op cit, at p. 27.

firms undertook projects singly or partially financed by the Community.<sup>61</sup> These instruments helped create a basis for future development.

Eventually, the focus on building the common market resulted in the milestone of the Single European Act (SEA) in 1986. This legal framework provided for a new legislative procedure, which was a cornerstone as it made it much easier for the Community to regulate issues concerning the common market. The SEA also set the goal to further develop the common market and to complete a true internal market by 1992. In effect, throughout the 1980s, the Community was fully occupied with its ambition to further emphasise the need to establish a true internal market. Again, it needs to be recalled that market forces, free movement and undistorted competition were the driving forces for its foundation. This also meant that industrial policy during this period was a less popular matter and it was rather provided for on a horizontal level within the Member States.<sup>62</sup>

But things did not end with the completion of the internal market in 1992. The Community has continued to evolve beyond merely an economic community into an economic and monetary union, founded upon ever-closer cooperation in additional policy fields. This has taken place in a world which is also coloured by global pressure and by new challenges such as the climate threat and rapid technological development. In establishing the European Union (including the monetary union) in 1992, the role of industrial policy at the EU level became more prominent, and a title dealing specifically with industrial policy was introduced in the Treaty.<sup>63</sup> This, alongside provisions on research and development and trans-European networks, closely related to industrial policy.<sup>64</sup> For the first time, there was a convergence of views and an implicit agreement among the Member

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<sup>61</sup> Ibid. at p. 28 – The European Strategic Programme for R & D in Information Technology (ESPRIT) – *“For every ESPRIT, there ought to be a range of national Alvey programmes that encourage the formation of industry and university links and disseminate technical information to the countless smaller national producers and users who could never join a Europe-wide initiative without making it unwieldy and unworkable. As was noted above, policy ought to be as local and as custom-built as possible. When economic markets spill over the borders of local policy jurisdiction, then a higher level of policy action may be called for. However, as one moves up the policy hierarchy from local to national policy and then to supra-national policy, the appropriate policy stance must shift from policy design to policy coordination to reflect the comparative advantages of policy makers at each level. Policy at a European level can never be as well informed, as capably executed, and as sensitive to local preferences as national policies, and should, therefore, never be allowed to override national policies. However, when economic markets spill over national boundaries, national policies are liable to conflict and, in any case, their viability is likely to be undermined. In this situation, there is a role for a supra-national policy to play in co-ordinating national programmes, enabling them to achieve as many of their goals as possible. In short, supra-national policy stands to national policy as a complement and not a substitute.”*

<sup>62</sup> Study requested by the ITRE committee, by CIL, University of Bari and CERPEM, University of Warsaw and EUROREG, *How to tackle challenges in a future-oriented EU industrial strategy?*, op cit, p. 29.

<sup>63</sup> Article 130, Treaty on European Union, 1992. See Kaupa, C., *The Pluralist Character of the European Economic Constitution*, Hart Publishing, Oxford and Portland, Oregon, 2016, at p. 158.

<sup>64</sup> Article 130f-p on research and development and Article 129 on trans-European networks, Treaty on European Union, 1992. See Kaupa, op cit, at p. 158.

States on common principles for industrial policy emphasising the importance of structural adjustment, maintaining a favourable business environment and an open approach to market.<sup>65</sup>

The Commission continued in the 2000s to stress the necessity of industrial policy in the process of market integration and asserted that this would help European companies to enhance their ability to benefit from the scale effects of the enlarged market. Interest was also renewed for industrial policy on national level, highlighting the importance of a pragmatic approach in the wake of globalisation, EU enlargement, deindustrialisation, slow growth and lagging productivity gains compared to the US and emerging countries.<sup>66</sup> Eventually, the global and financial crises in 2008 prompted governments to act, and their active involvement in strengthening European industry was legitimised. The national and European approaches were characterised by the continued commitment to horizontal actions and the improvement of framework conditions in which businesses work, complemented by a broader vision considering sectoral specificities and technological issues.<sup>67</sup>

The Lisbon Treaty provides that “[t]he Union and the Member States shall ensure that the conditions necessary for the competitiveness of the Union’s industry exists.”<sup>68</sup> This constitutes the present legal basis for the EU to adopt an EU industrial policy, although it does not provide the EU with the regulatory competence to regulate economic policy in this respect. However, in relation to the establishment and functioning of the Single Market, the EU has at its disposal regulatory instruments which may have strong effects on industrial policy. As discussed above, such instruments may be found in relation to the Single Market providing for regulatory competence, especially within the field of competition, state aid and public procurement law, as discussed by Vladimir Bastidas Venegas, Jörgen Hettne and Marta Andhov in this volume. Furthermore, also as regards regulatory instruments in relation to foreign direct investments, discussed by Thomas Papadopoulos in this volume, have become a central issue to the EU and the Member States.

Despite the long-lasting resistance to industrial policy and its influence on the Single Market, there are many indications that the creation of a common economic growth for the EU requires that all kinds of different policy fields pull together. The emergence of economic difficulties, sectorial crises and industries or sectors lagging behind tend to quickly trigger tensions between national and

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<sup>65</sup> Study requested by the ITRE committee, European Parliament, *How to tackle challenges in a future-oriented EU industrial strategy?*, 2019, op cit, p. 29.

<sup>66</sup> Id.

<sup>67</sup> Id., p. 29, also referring to the Study for the ITRE Committee, European Parliament, *EU Industrial Policy: Assessment of Recent Developments and Recommendations for Future Policies*, 2015, op cit.

<sup>68</sup> Article 173(1) of the Treaty on the Functioning of the European Union.

EU economic policies and the rules and principles of the Single Market. The ongoing pandemic is only one sign of this. In effect, it is important to fully consider how such challenges are best dealt with, taking into account the benefits of the proper functioning of the Single Market and making the best use of the common resources, while not losing the geopolitical and national perspective. There is a need to find the most solid balance between the common good for the EU and national and regional concerns.

## 2.5 Future co-existence of the Single Market and EU industrial policy

Considering the question posed in this chapter – whether there is a need to rebalance, on the one hand, the securing of the foundational rules and principles of the Single Market providing for *a level playing field and fair competition* and, on the other hand, industrial policy capable of securing a place for European companies on *the global stage*, and whether there are tools within the EU legal framework that may establish a harmonious balance between these two important interests – the following three issues may be of interest:

Firstly, the Lisbon Treaty came with a Treaty amendment with possible implications for the interpretation of EU competition laws. In the previous treaty, it was spelled out that one of the *activities* of the Community is the establishment of “a system ensuring that competition in the internal market is not distorted.”<sup>69</sup> But due to the insistence of France, following the negative vote in the referendum on the Constitutional Treaty,<sup>70</sup> this was moved to a Protocol attached to the Treaty. The current Protocol provision instead reads that the internal market “...*includes* a system ensuring that competition is not distorted.”<sup>71</sup> The question is whether this may reflect a growing will and need to reconsider total free and fair competition and a level playing field to some extent within the EU. This is also seen in light of several Member States, through the Friends of Industry, emphasising, among other things, the need for an industrial policy to strengthen the EU’s strategic autonomy and identifying strategic value

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<sup>69</sup> Article 3(g) of the Treaty on the European Union, Treaty of Nice.

<sup>70</sup> Maher, I., *Competition Law Modernization: An Evolutionary Tale?*, In Craig, P. and de Búrca, G., editors, *The Evolution of EU Law*, 2<sup>nd</sup> ed., Oxford University Press, 2011, p. 717–782, at p. 723, referring to S. Seeger, “*From Referendum Euphoria to Referendum Phobia – Framing the Ratification Question*”, (2008) 10 EJLR 437, 445. Seeger provides that “76 per cent of the no-voters stated that the TEC either would have negative effects on the employment in France, that the economic situation in the country already was too weak or that the document was too liberal in economic terms” and that “...Sarkozy’s framing strategy picked up the most prominent arguments put forward in the 2005 no-campaign: He succeeded in scrapping the EU treaty from the aim of creating a common market based on “free and undistorted” competition which the TEC had mentioned in article 1 and thus reacted to the fears towards a neo-liberal European economic policy”, whereafter the Lisbon Treaty was finally ratified by a large majority.

<sup>71</sup> Protocol No 27 TEU.

chains for the EU.<sup>72</sup> The Commission's New Industrial Strategy stated that the EU "...must resist the simplistic temptations that come with protectionism or market distortion, while not being naïve in the face of unfair competition."<sup>73</sup>

Secondly, in the wake of an ever-closer Union evolving through Treaty amendments throughout the years, increasing globalisation, EU enlargement in general over the years, deindustrialisation, digitalisation, etc., a horizontal approach in relation to industrial policy has emerged. Or rather, the European Council Conclusions in March 2019 indicate that it is more correct to view it as an integrated approach, including all dimensions. More or less all policy fields, legal areas and economic sectors will thereby be, in some respect, affected both by national and EU industrial policy horizontally. The challenge is to find a way that avoids uncoordinated and incoherent measures and instruments at both national and EU levels; instead, the need for coordinated and concurrent measures should be emphasised. There is always a risk that one may not see the wood for the trees when adopting sectorial or national measures and in reacting to crises. The question is how the EU can best manage to balance EU industrial policy, detailed regional and sectorial economic planning by the Member States, the proper functioning of the Single Market and coordination of the common goals of an EU industrial policy. The EU has to create this balance while considering globalisation, increasing competition from China and the US, sustainability challenges, rapid technological changes, an unstable global trade environment and global crises such as the Covid-19 pandemic.

Thirdly, is "EU industrial policy/strategy" an outdated name? Should the policy be presented as an "innovation" policy instead, or possibly a "global competitiveness" policy, or maybe even a bit provocatively "EU growth and sovereignty" policy? In contrast with previous examples from the 1960s and 1970s, the EU industrial policy or strategy of today seems to fulfil the purpose of providing a general innovation and economic policy founded on a horizontal approach and on coordination in general, rather than providing for economic planning merely in relation to industries. This would possibly also lessen the negative connotations of the concept as such.

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<sup>72</sup> See, Hettne in this volume. The Friends of Industry are described as a group of likeminded EU Member States that meet once a year to discuss recent developments related to industrial policy at EU Level. See, the sixth meeting in December 2019, [https://www.gouvernement.fr/sites/default/files/locale/piece-jointe/2018/12/929\\_-\\_declaration\\_finale\\_-\\_6eme\\_reunion\\_des\\_amis\\_de\\_lindustrie-en.pdf](https://www.gouvernement.fr/sites/default/files/locale/piece-jointe/2018/12/929_-_declaration_finale_-_6eme_reunion_des_amis_de_lindustrie-en.pdf). The latest achievement, the Vienna Declaration, was signed by Austria, Bulgaria, Croatia, Denmark, France, Germany, Greece, Italy, Latvia, Luxembourg, The Netherlands, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden. The group is inclusive and open to any Member State. See <https://www.bmdw.gv.at/en/Topics/Europe-and-EU/Austria-in-the-European-Union/Seventh-Friends-of-Industry-Ministerial-Conference.html>.

<sup>73</sup> Communication from the Commission, A new industrial strategy for Europe, op cit, p. 1.

## 2.6 Conclusion

In conclusion, there seems to be a need to rebalance between the interest in securing the foundational rules and principles of the Single Market, on the one hand, and the interest in securing a place for European companies on the global stage, on the other hand. In this respect it may be argued that there is a need for strong and expressed powers for the EU to deliver a coherent EU industrial policy, as put forward by Jörgen Hettne in his study below. This could put the EU in a better position to succeed in its attempt to enhance the competitiveness of European enterprises as well as the EU's role on the global stage through a more integrated approach that connects all dimensions. However, it may be argued that such powers are already found to a great extent in the Treaty provisions in relation to the Single Market. As noted in this chapter, the foundational rules and principles of the Single Market leave some room for manoeuvre, even though arrangements and measures would obstruct free movement or distort competition. This room is found in relation to measures that are taken to protect public policy, public health, public security and other public interests, related to the specifics of the different fields of law, as illustrated also in the contributions by Vladimir Bastidas, Jörgen Hettne, Marta Andhov and Thomas Papadopoulos. The necessary space for further adjustments in order to cope with most of the present challenges of increasing globalisation, sustainability and rapid technical development seems therefore already present. Having said this, purely economic considerations may not be used to justify obstructions to free movement or distortion of competition, which is why the foundation of the Single Market is secured. Yet, the most demanding challenges to an industrial policy founded on an integrated approach connecting all dimensions and making the relevant adjustments within the scope of the Single Market and its vast amount of existing rules in all areas of law, policy fields and sectors are understanding, coordination and knowledge within all local, regional, national and EU authorities and institutions. This implies not only that all must pull together in the same direction but also that there are adequate considerations taken with regard to the geopolitical issues.<sup>74</sup>

In the absence of a common understanding on these issues, the EU industrial strategy risks being ineffective and losing support. At the same time, the foundation of the Single Market and a level playing field within the EU must be safeguarded so that it is not destroyed while there is a rise in some sort of “European” protectionism. However, the foundational principles of the Single Market, including proportionality, provide the tools that should be able to aid in striking the right balance between free movement, free and fair competition, and issues of industrial policy. In this sense, industrial policy aims at promoting the competitiveness of European enterprises and the EU's role on the global stage.

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<sup>74</sup> Pilati, M., *A geographically fair EU industrial strategy*, EPC, 21710/2019, also referred to in Bjerckhem, J., Pilati, M., *A renewed start from Europe? 4 takeaways from the EU's New Industrial Strategy*, EPC, 12/03/2020.

# 3 Should Competition Law promote competition or competitiveness?

*Vladimir Bastidas Venegas*

## 3.1 Introduction

This contribution addresses the intersection between EU competition law and EU industrial policy. While it may be argued that EU industrial policy and EU Competition rules, in general, pursue the goal of increasing the competitiveness of European industry, there is a potential tension between the application of competition law and the achievement of the goals pursued with EU Industrial policy.

The aim of EU industrial policy is to promote the competitiveness of EU industry in global markets. In particular, EU industries should stay and become world leaders in innovation, digitalisation and decarbonation.<sup>75</sup> Companies will strive to improve their competitiveness in a variety of ways, not only by innovating new technology, products and services but also by coming up with new business models, marketing and sales methods. They may also engage in collaboration with other companies, as well as take structural measures such as mergers and acquisitions. Several factors may affect the competitiveness of European industry. The regulatory framework for specific sectors (e.g., technical requirements for products and services) may encourage companies to make better products and services but may also hinder market entry and growth. Active measures (such as aid or tax rules) taken by Member States and the EU to promote certain economic activities, sectors or innovation may benefit markets, undertakings, growth and employment but may also distort competition.

The goal of the EU Competition rules, arguably, is also to promote the competitiveness of companies on European markets. EU Competition Law pursues such a goal by protecting competition and preventing the exploitation of market power. In particular, Article 102 of the Treaty on the Functioning of the European Union (TFEU) prohibits the so-called abuse of a dominant position, as such conduct by companies that are in a position of market power may either eliminate or restrict competition or constitute an exploitation of customers. In addition, EU Competition law prohibits certain mergers and acquisitions

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<sup>75</sup> State of the Union 2017 – industrial policy strategy: Investing in a smart, innovative and sustainable industry, Published on: 18/09/2017.

under the Merger Regulation that are deemed anti-competitive.<sup>76</sup> Those rules make a careful balance between, on the one hand, leaving enough freedom for companies to apply and introduce new business models, marketing and sales methods, to collaborate with other companies, as well as to grow through mergers and acquisitions in order to increase their competitiveness on local, regional and global markets, and, on the other hand, striking down conduct that may have a negative impact on the level of competition in the market, with detrimental effects on consumers.

It follows that the interpretation and application of the competition rules may have an impact on industrial policy goals. The underenforcement of competition law may not incentivize companies sufficiently to improve their performance to compete successfully in global markets. Allowing mergers and acquisitions that consolidate and strengthen the market position of companies in the internal market does not necessarily translate into increased competitiveness globally, while such transactions may kill off competition from small competitors and potential competition. Allowing certain anti-competitive conduct may also strengthen the position and increase the profits of a dominant undertaking but result in negative effects for consumers. The overenforcement of competition law may, on the other hand, suppress mergers and acquisitions or new methods of competition that would improve the performance of companies, both in terms of efficiencies and competitiveness, and thus counteract the goals of industrial policy. The tension between the competition law and industrial policy has particularly concerned to what extent industrial policy considerations should play a role in the interpretation of the competition rules, for instance, by balancing the negative effects of a merger on competition against the improved competitiveness of the companies in question in global markets. From a competition law perspective, it is often argued that EU competition law must be kept clear of policy interests such as non-economic goals and/or industrial policy concerns.

The industrial policy/competition law intersection is hardly a new theme, as it has been discussed ever since the negotiations of the Rome Treaty. However, recent developments have intensified the discussion regarding whether the competition rules are well calibrated from an industrial policy perspective including: the increased market domination by giant tech firms and their potentially anti-competitive behaviour; the increased presence of state-financed undertakings originating from outside Europe which potentially constitute a threat in markets that are sensitive for the Member States; and the (sometimes) alleged lack of competitiveness of European firms, as illustrated by the numbers of larger European firms in tech markets.

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<sup>76</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ [2004] L 24/1 (Merger Regulation).

Accordingly, three broader issues are analysed below. The first issue is whether the overenforcement of Merger Control may obstruct the competitiveness of European firms. The second issue concerns whether there is also an underenforcement of European Competition Law in digital markets. The third issue is to what extent policy considerations that are external to competition law should be taken into account when dealing with the specific challenges raised by firms that are controlled by states from outside the EU and by the tech giants' collection and use of consumers' private data.

### **3.2 Merger Control and the promotion of competitiveness**

This section deals with the first issue raised in the introduction: whether the overenforcement of the rules on Merger Control may hinder the growth of undertakings through merger transactions. In order to answer this question, two sub-issues integral to the analysis of mergers are discussed in the following sections. The first sub-issue concerns the possibility of the merging parties arguing that potential competition is a mitigating factor in the application of the assessment of a merger. The second sub-issue concerns the merging parties' possibilities to claim efficiencies as a factor countervailing the negative effects of the merger transaction. Both of these issues have a direct impact on the possibilities for merging undertakings to grow through structural changes and thus increase their competitiveness in the global market.

#### **3.2.1 Potential competition as a countervailing factor**

The evaluation of merger transactions requires a complete investigation of market conditions, *inter alia* the strength of existing competitors, entry barriers and potential competition, the structure of demand and supply, etc. Importantly, the evaluation of entry barriers and potential competition refers to the possibility of undertakings that at the time of the assessment are outside the market entering the market within a certain time frame. *Potential competition* is an essential factor in the full market investigation. The assessment may demonstrate that market entry will occur to such an extent that it would increase the competitive pressure on the merged entity such that it could not have any market power. Such an assessment concerns a prospective analysis of the likely future conduct of undertakings making the assessment complex and uncertain, both for the Commission as well as the merging parties. In addition, the time frame for analysing potential entry is normally two years, which makes the prospect of demonstrating *timely* entry even more difficult.

In this context, an interesting issue that has emerged recently, following the blocking of the *Siemens/Alstom*-merger, is whether the interpretation made by the Commission is too strict by not taking into account potential competition to a sufficient degree.<sup>77</sup> The Commission blocked the transaction after finding

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<sup>77</sup> Commission Decision declaring a concentration incompatible with the internal market, 06/02/2019, Case M.8677 *Siemens/Alstom*, C (2019) 921 Final (*Siemens/Alstom*).

that the parties were each other's closest competitor. They would therefore have eliminated an important competitor in the markets for high-speed rolling stock and mainline signalling systems. Apart from being a very sensitive and controversial decision, the Commission's assessment is interesting because of the analysis of potential competition. The parties had, in particular, argued that there was potential competition from companies from China, Korea and Japan that within the long-term could have entered the markets and exerted competitive pressure on the merged entity.<sup>78</sup> However, on the basis of past bids, the Commission found that most of the alleged potential competitors had been so far incapable of participating and giving credible bids. Accordingly, it was concluded that the companies in question did not constitute potential competition.

Taking the facts disclosed in the decision of the Commission as accurate, it is difficult not to support the conclusions made in *Siemens/Alstom*. In particular, the fact that the identified undertakings that could have been potential competitors had been incapable of participating in competitive bids in the past is a convincing indication that the companies were not potential competitors. Moreover, the Commission also pointed at past merger decisions where some of the undertakings had been assessed inaccurately as potential competitors.

However, even if the Commission's conclusions in *Siemens/Alstom* are supported, it does not mean that the Commission's analysis of potential competition is adequate. It seems apparent that there is a high threshold for showing that undertakings are potential competitors, since it must be demonstrated that the companies not only have the capability but also the incentives to enter the market, which may be difficult in individual cases. In addition, the relatively short time frame applied in the assessment of potential entry is also problematic.

### 3.2.2 Efficiency defence

A long-debated issue with a clear connection to industrial policy in Merger Control concerns the acceptance of an efficiency defence. Negative effects of a merger on competition may be mitigated by efficiencies realized by the transaction if this may be shown by the parties. Thus, in theory, a balance between restrictions on competition and the increased efficiencies created through the merger could encompass a balance between competition and the individual firm's competitiveness. If the Commission's assessment of efficiency claims is too harsh, it may decrease the possibility of companies increasing their competitiveness, particularly in global markets. A sound industrial policy may require that the material assessment of merger transactions does not unnecessarily strike down structural changes that increase competitiveness of firms and that outweigh any potential negative effects on competition. It should be remembered that a merger is the kind of transaction that rarely has an explicit

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<sup>78</sup> *Siemens/Alstom*, recitals 488–536, 1024–1027, 1084, 1166–1167.

aim to restrict competition. The Commission's practice seems to support such a view, considering how few mergers have been blocked. Thus, it could be argued that under such circumstances, the assessment of mergers should be even more generous as regards the acceptance of efficiency defences.

According to the Horizontal Merger Guidelines, efficiencies have to benefit the consumers, be merger-specific and be verifiable.<sup>79</sup> Importantly, the Horizontal Merger Guidelines state that it is necessary to conclude that the pro-efficiencies of the merger are likely to offer the ability and the incentives for the merging parties to act pro-competitively and benefit the consumers in such a way as to counteract the possible anti-competitive effects of the merger (consumer welfare standard).<sup>80</sup> Such a view seems to indicate that if the merging parties are unable to demonstrate that they would not exercise their market power, the Commission would never approve such a merger irrespective of the efficiency benefits derived from the transaction. In fact, some authors have suggested that an efficiency defence cannot succeed when the concentration results in the creation or the strengthening of a dominant position.<sup>81</sup>

There are several criticisms regarding the assessment of efficiencies. Firstly, it could be claimed that the consumer welfare standard as such is problematic because it fails to consider efficiencies that would increase the competitiveness of individual firms, such as the ability to create research and develop better products and services.<sup>82</sup> Secondly, the requirement that benefits must be merger-specific is strict and may exclude many rationalizations that are typically carried out by merging parties.<sup>83</sup> Thirdly, it is claimed that the Commission's overly negative view of efficiency defences also has a signalling function resulting in merging parties preferring not to raise an efficiency defence because it could be interpreted as an admission that the merger is anti-competitive.<sup>84</sup> Fourthly, it

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<sup>79</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings OJ [2004] C 31/5 (Horizontal Merger Guidelines), para 78.

<sup>80</sup> Horizontal Merger Guidelines, para 77.

<sup>81</sup> Pál Szilágyi, "How to give a meaningful interpretation to the efficiency defence in European competition law?" (2014) 35 E.C.L.R., 539–541.

<sup>82</sup> M Kocmut, "Efficiency considerations and merger control – quo vadis, Commission?" (2006) 27 E.C.L.R. 19.

<sup>83</sup> P Kuoppamäki and S Torstila, "Is there a future of an efficiency defense in European Merger Control?" (2015), available at SSRN: <https://ssrn.com/abstract=2727171> or <http://dx.doi.org/10.2139/ssrn.2727171> (last accessed 2020-05-04), 11. For example, the closing down of production facilities following a merger transaction would probably not be viewed as being merger-specific. Without the merger, market forces would normally result in the closing of those facilities if they are costly and unprofitable.

<sup>84</sup> Kuoppamäki & Torstila, *op. cit.*, 33–34; D Cardwell, "The Role of the Efficiency Defence in EU Merger Control Proceedings Following UPS/TNT, FedEx/ TNT and UPS v. Commission" (2017) 8 Journal of European Competition Law & Practice 551, 554.

seems clear that the Commission has not yet accepted an efficiency defence in cases where the restrictions on competition have been substantial.<sup>85</sup>

A careful conclusion may be that Merger Control may obstruct the improvement of the competitiveness of undertakings if efficiency defences are not sufficiently considered. Yet, very few mergers are blocked by the Commission. In light of those rare cases where the Commission blocks transactions, it seems exaggerated to claim that the application of the Merger Regulation would generally obstruct the competitiveness of European industry.

### **3.3 European Competition Law and restrictions on competition in digital markets**

This section addresses the second issue raised in the introduction: the possibility that the current EU competition law practice is too lenient to capture actual anti-competitive conduct related to digital markets. The emergence of digital markets has led to a group of companies, the so-called tech giants, acquiring strong positions of market power. For instance, over the last twenty years, Google has acquired more than 200 firms through merger transactions, few of which have been subject to scrutiny by the competition authorities but which arguably have contributed to its current position of market power. There are two potential weaknesses within the EU competition law framework concerning the analysis of anti-competitive mergers which may have permitted or facilitated the rise of the tech giants. Firstly, it could be claimed that the current practice, through its traditional market definition and substantial assessment, misses the target of interest in digital markets, namely the so-called ecosystems. Secondly, the scope of Merger Control may be too narrow to capture certain transactions that in the long run have detrimental effects on competition.

#### **3.3.1 Digital markets and ecosystems**

An ecosystem refers to when an undertaking or group of undertakings offers a bundle of complementary digital services (constituting different markets) to consumers through one access point.<sup>86</sup> In digital markets, ecosystems may be built around one or several platforms. For instance, a consumer who purchases a

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<sup>85</sup> Cardwell, *op. cit.*, 558; Pál Szilágyi, *op. cit.*, 539–541. It seems that arguments based on efficiencies have been successful in cases where the restriction on competition were mild and where there was a possibility of clearing the merger even without the claimed efficiencies. If this view is right, it follows that when the substantial restrictions on competition are present, it is very hard to prove that efficiencies will be transferred to consumers.

<sup>86</sup> J Crémer, Y-A de Montjoye and H Schweitzer, “Competition Policy for the Digital Era” (2019), Report written for DG COMP, 47–48. Ecosystems have been described as “[...]conglomerates covering customer needs in certain areas of life/business having the ability to transfer market power from one central market to adjacent, upstream or downstream markets, for instance through integration, bundling, or predatory pricing strategies, in order to establish themselves as focal point of the customers’ and/or businesses’ needs in certain areas”, Christian Karbaum and Max Schultz, “Ecosystems – new challenges for Competition Law enforcement” (2018), available at [https://ec.europa.eu/competition/information/digitisation\\_2018/contributions/glade\\_michel\\_wirtz.pdf](https://ec.europa.eu/competition/information/digitisation_2018/contributions/glade_michel_wirtz.pdf) (last accessed 2020-05-04), p. 3.

mobile phone may get access to an online app store, online video services, online music, online shop for music, books and movies, payment services, etc. The owner of an ecosystem may benefit from economics of scope, since the provision of some services makes it more efficient to provide additional services.<sup>87</sup> The owner(s) of an ecosystem may have the capability of leveraging market power in one or several markets to other markets in the ecosystem. This may occur if the undertaking can use market power in its core market, e.g., provision of a search engine, to push a number of other programmes or services that are often complementary (such as the provision of videos uploaded by users) to its customer base. In addition, companies may reinforce and expand their market position by expanding an ecosystem into new markets through merger transactions. If companies do this successfully, it may lead to situations where customers and end-consumers become “locked-in” because they would not choose alternative products or services with the risk of foregoing the goods or services supplied in the core markets by the company that owns the ecosystem. This raises the potential for exploitation of customers, even in markets for products and services that do not constitute the core markets within an ecosystem (fringe markets).

Importantly, the application of the rules on Merger Control and the prohibition of abuse of a dominant position rely heavily on an accurate definition of the relevant markets that are used to measure whether companies have market power and to evaluate the effects of a specific conduct or a merger transaction. The main problem as regards digital markets is that the traditional market definition is not designed for the analysis of ecosystems. A traditional definition of relevant markets may focus too much on the anti-competitive effects in a specific market without taking into account the effects on related markets, such as other markets belonging to the same ecosystem. Consequently, a traditional evaluation of the relevant market could lead to the conclusion that an average customer would shift to other products or services following a price increase imposed by a company or following a merger transaction. However, under certain circumstances, the fact that the average customer is dependent on the ecosystem’s core products/services may prevent such migration. Accordingly, even when the supplier of a product or service has a weak presence in a fringe market within an ecosystem, it could still engage in conduct that is harmful for customers and end-consumers. A traditional market analysis may therefore underestimate market power and negative effects in fringe markets in an ecosystem.

While the interrelation between different relevant markets is hardly a new problem within EU Competition Law, it must be underlined that there is a high degree of uncertainty regarding how to design the antitrust analysis specifically in cases involving ecosystems. There is little guidance available about how to carry out an analysis to identify the presence of an ecosystem or to measure the competition between ecosystems. There is even less guidance on how to

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<sup>87</sup> Crémer, de Montjoye & Schweitzer, *op. cit.*, 33–34.

determine when the analysis of such competition should supersede a more traditional analysis of narrowly defined markets. For instance, in the report on the competition law assessment in digital markets published by the Commission, it is simply recommended that traditional narrow antitrust markets should be analysed alongside markets for digital ecosystems, as well as fringe markets where consumers appear to be locked-in in ecosystems.<sup>88</sup> Such a view appears reasonable (and correct) but does not really provide a method of analysis.

It is also important to note that the application of competition law to cases involving ecosystems are more problematic in merger cases than in cases regarding conduct by dominant companies. Court cases such as *Microsoft* and Commission cases such as the *Google decisions* at least provide some guidance on when leveraging across markets may be anti-competitive.<sup>89</sup> However, as regards Merger Control, the situation is arguably trickier. Unlike abuse cases, Merger Control will not address *past* unilateral conduct by a dominant undertaking aimed at exploiting consumers or excluding competitors. Merger cases will simply concern the acquisition of another undertaking. The analysis thus requires a prediction about whether an acquisition that today seems unproblematic could result in the expansion of market power of an ecosystem into completely new markets or existing adjacent markets in the near future, as well as result in future unilateral conduct that leads to foreclosure and consumer harm.<sup>90</sup> Such an analysis is more speculative in nature. In this regard, there is little guidance in previous case law and Commission practice, except for a handful of cases on conglomerate mergers.

Conglomerate mergers are transactions that allow the merged entity to sell a wider range of complementary products to one and the same customer group. Exceptionally, such a merger transaction may result in a position of market power for the merged entity as competitors selling only one or a few of the complementary products may be put at a disadvantage. Similar to the situation of ecosystems, the merged entity may, through its conduct (post-merger), also exploit its advantage by forcing customers to buy a wider range of products, even though the customer would prefer to purchase some of those goods separately from other suppliers. Looking at previous cases concerning conglomerate effects, such as *Tetra Laval* and *GE/Honeywell*, it follows that they are difficult for the Commission to win and that the standard of proof is likely higher

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<sup>88</sup> *Ibid.*, 4.

<sup>89</sup> Case T-201/04 *Microsoft Corp. v Commission of the European Communities*, EU:T:2007:289; Commission Decision, AT.39740 *Google Search (Shopping)*, C (2017) 4444 Final; Commission Decision, *Google Android*, case AT.40099, C (2018) 4761 Final.

<sup>90</sup> See, e.g., Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ [2008] C 265/6 (Non-horizontal guidelines), para 94.

than the traditional standard of proof applied to other types of mergers.<sup>91</sup> The demonstration of negative effects normally requires a prospective analysis of a chain of events, which makes such predictions uncertain. It is therefore no surprise that the Commission has so far been unsuccessful in cases regarding conglomerate mergers.

It should be added that cases on conglomerate mergers concern relatively uncomplicated situations when compared to situations involving digital ecosystems. In case of conglomerate mergers, it is normally possible to establish a somewhat well-defined customer who demands a set of complementary goods offered by the merged entity. This is not necessarily the situation when addressing mergers concerning digital ecosystems. An important customer group in many ecosystems consists of end-consumers who may find a variety of bundles of different goods and services beneficial and which attract them to a particular ecosystem. Rival ecosystems may only partially “overlap” in their competition in specific markets. It is therefore more difficult to assess how a mix of offered services and/or goods in conjunction with unilateral conduct aimed at promoting the ecosystem may impact rival ecosystems that offer a different set of goods and services. While there seem to be a somewhat common view that it is crucial to assess the effects in relation to the core service(s) of an ecosystem, referring to the specific market(s) that is essential to the ecosystem’s competitive advantage/strength, it does not mean that the competitive analysis is made less complex. Such a complex, holistic competitive assessment is unexplored in current decisional practice.

In conclusion, it follows that the assessment of possible potential harmful mergers on the competition between different ecosystems is complex and, foremost, unexplored. There is a need to develop tools on how to define ecosystem rivalry and markets, as well as to create an analytical framework for such a competitive assessment. In the absence of current workable tools in EU competition law for both of the above-mentioned issues, there are no clear policy recommendations to offer.

### 3.3.2 The scope of the Merger Regulation and killer acquisitions

The term “killer acquisitions” refers to certain anti-competitive transactions that nonetheless fall outside the scope of the Merger Regulation because the turnover of the merging parties is too small. In addition, there are transactions falling within the scope of the Merger Regulation but where the merging parties’ market shares are so modest that they are *prima facie* unproblematic under a traditional merger analysis. Accordingly, in these transactions, the acquiring

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<sup>91</sup> Case C-12/03 P Commission of the European Communities v Tetra Laval BV, EU:C:2005:87 (Tetra Laval), paras 39–45; Case T-210/01 General Electric Company v Commission of the European Communities, EU:T:2005:456, paras 63–64, 65–66.

party may eliminate small or potential competitors that in the long run would have exerted competitive pressure in the market.

It should be emphasized that killer acquisitions are not new. In the pharmaceutical industry, the potential problems of such transactions have long been recognized. Recently, this issue has also arisen in “tech markets”, as exemplified by *Facebook/WhatsApp*.<sup>92</sup> It is commonly recounted that Google has consistently bought small start-up companies, of which just a few have been subject to merger control. If a larger actor can consistently buy up competitors or potential competitors at an early stage when the turnover of the acquired firm is likely to make the transaction to fall outside the jurisdictional thresholds in the Merger Regulation, companies may have the possibility of reaching a position of market power or maintaining an already acquired position of market power.<sup>93</sup>

Interestingly, this issue has already triggered reforms in national competition law. In Germany and Austria, it has resulted in the application of jurisdictional thresholds that are not only based on turnover but also the value of the transaction.<sup>94</sup> For instance, in *Facebook/Instagram*, the parties had a very small turnover while the purchase price or the value of Instagram amounted to more than €2 billion. Thus, the introduction of an additional jurisdictional threshold could alleviate a potential gap in the merger rules by firstly subjecting the merger transactions to control by competition authorities. This is, however, only part of a solution. Significantly, changes to the jurisdictional thresholds do not mean that more mergers are blocked, only that competition authorities may supervise such merger transactions. To the extent that a traditional merger analysis is still unable to capture the problems that such merger transactions raise, such a reform of jurisdictional rules is likely to be insufficient.

As regards the “second” part of a solution, it would require the competition authorities to amend their analysis of the merger transactions in tech markets. The analysis should attach greater weight to the fact that the target company may be a potential competitor that in the longer term could constitute a competitive threat to the acquiring party. In recent merger decisions, e.g., *Dow/Dupont*, the Commission has considered potential competition to a greater extent.<sup>95</sup> The Commission took into consideration products not yet in the market but in early development, so-called pipeline products, in its competitive assessment, thus extending the relevant time frame when making the assessment of a potential

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<sup>92</sup> Case COMP/M.7217 Facebook/WhatsApp (Facebook/WhatsApp).

<sup>93</sup> Crémer, de Montjoye & Schweitzer, op. cit., 110–116.

<sup>94</sup> N Jung and E Sinclair, “Innovation theories of harm in merger control: Plugging a perceived enforcement gap in anticipation of more far-reaching reforms” (2019) 40 E.C.L.R. 266, 267; M Sauermann, “The transaction value threshold in Germany – experiences with the new size of transaction test in Merger Control” (2019), Competition Policy International, available at <https://www.competitionpolicyinternational.com/the-transaction-value-threshold-in-germany-experiences-with-the-new-size-of-transaction-test-in-merger-control/> (last accessed 2020-05-04).

<sup>95</sup> Case M.7932, *Dow/Dupont*, C (2017) 1946 Final.

competitor. Obviously, the potential problem with such an approach is that the Commission's analysis will become more speculative because it is difficult to predict to what extent the target company would constitute a competitive threat. Thus, such an extensive view on potential competition may result in errors in the material assessment. The recent approach by the Commission to potential competition could be applied to cases in tech markets, such as *Facebook/WhatsApp*. Considering that the decisional practice of the Commission shows that the value of data is difficult to assess and that the projections of digital services by small start-up firms are uncertain, it may be even more difficult to properly determine whether small start-up firms truly constitute potential competition.

In conclusion, it seems that introducing additional jurisdictional thresholds in the Merger Regulation to increase scrutiny of the acquisition of smaller target companies is a well-balanced solution. Such additional thresholds do not have any implications for the outcomes of these cases but simply increase the supervision carried out by competition agencies. In addition to increased scrutiny of merger transactions, it is also necessary that the Commission and competition agencies develop tools to determine when the acquisition of smaller start-up firms may result in anti-competitive harm. While an extensive application of the concept of potential competition may provide such a solution, it adds the risk of overenforcement of EU competition law.

### **3.4 EU Competition Law and the influence of “external policies”**

While the previous sections have dealt with issues that are related to integral parts of competition law analysis, the two sub-issues addressed by this section concern the explicit influence of aspects external to competition law (external policies) in the assessment under the prohibition of an abuse of a dominant position and the Merger Regulation. Thus, these sub-issues concern aspects more directly related to the intersection between industrial policy and competition law.

Firstly, whether privacy aspects should be relevant to the application of competition law to data cases will be explored. Secondly, the possibility of applying the rules in the Merger Regulation, which permit the blocking of mergers to protect legitimate interests external to competition law, is discussed in relation to the problem with third state-controlled undertakings involved in merger transactions in the internal market.

#### **3.4.1 Data cases and anti-competitive behaviour**

One of the most intriguing questions is whether the acquisition, control or handling of data, or the imposition of conditions on end-consumers related to data (data cases) may either constitute an abuse of a dominant position or result in the blocking of a transaction under the Merger Regulation. Controlling/possessing data in tech markets may constitute a competitive advantage and result in a dominant position or a position of market power (although this is

contested). In part, this issue raises the question whether the goal of consumer welfare under competition law should be interpreted so widely that it would embrace consumer protection similar to rules on the protection of privacy. In practice, it would imply that competition authorities would consider whether data protection rules have been breached by a dominant company or could be breached in the future by the merging parties. This issue relates to the industrial policy/competition law intersection in two ways. Firstly, it could be discussed whether or not the competition rules would be detached from their aim if consumer welfare were interpreted so extensively. The risk is that external policies make the competition rules less in line with economic theory and arguably more political. Secondly, if competition law is applied too strictly to the handling of personal data, it could also hinder the development of digital markets.

The discussion regarding if and to what an extent the breach of data protection rules should be considered when determining whether a conduct is anti-competitive emerged especially after the German Bundeskartellamt's decision in Facebook.<sup>96</sup> The decision on abuse of a dominant position was partly based on the breach of the rules on privacy. While the case is widely debated (and also criticized), it appears that the breach of data protection rules was used as a supporting factor and as a justification when finding the abuse.

A preliminary issue in this type of case is whether the legality or illegality of the conduct by a dominant company under rules other than competition law would have any implications for the classification of the conduct under competition law as anti-competitive. Previous cases on abuse of a dominant position, such as *ITT Promedia*,<sup>97</sup> *Deutsche Telekom*<sup>98</sup> and *AstraZeneca*,<sup>99</sup> do not indicate that the legality or illegality under rules other than competition law would automatically determine whether the conduct is permitted or illegal. It follows that both legal and illegal behaviour under rules other than competition law *may* be classified as abusive. In all these cases, the discussion also focused on the possibility of the dominant undertaking protecting or strengthening its position by eliminating a competitor, indicating a nexus between the conduct in question and market power. From *AstraZeneca*, it also follows that the illegality of the conduct under rules other than competition law *may* support the notion that the conduct does not constitute normal market behaviour, which – without being decisive

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<sup>96</sup> Bundeskartellamt, Case B6-22/16, Facebook, see press release at [https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf;jsessionid=A82BB51FC236DE99DEDBBF794E961517.1\\_cid378?\\_\\_blob=publicationFile&cv=4](https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf;jsessionid=A82BB51FC236DE99DEDBBF794E961517.1_cid378?__blob=publicationFile&cv=4) (last accessed 2020-05-04) (*Facebook*). For an overview of the discussion caused by the case, see, e.g., G Colangelo and M Maggiolino, “Antitrust Uber Alles. Whither Competition Law after Facebook?” (2019) 42 *World Competition* 355.

<sup>97</sup> Case T-111/96 *ITT Promedia NV v Commission of the European Communities*, EU:T:1998:183.

<sup>98</sup> Case C-280/08 P *Deutsche Telekom AG v European Commission*, EU:C:2010:603.

<sup>99</sup> Case C457/10 P *AstraZeneca AB and AstraZeneca plc v European Commission*, EU:C:2012:770 (*AstraZeneca*), para 132.

– may be relevant in the finding of abuse. However, it is not self-evident that the Court would follow the same approach as regards data protection. This is due to a statement by the Court in *Asnef-Equinaf* that seems to explicitly exclude the consideration of privacy issues from the scope of consumer harm in competition law.<sup>100</sup> The case concerned the potentially anti-competitive exchange of information between companies because of their cooperation regarding a credit register. The case did not really address the question whether the handling of personal data constituted an anti-competitive practice, but both the Advocate-General and the Court discarded the relevance of privacy issues for the evaluation if such a credit register could be a legitimate form of cooperation between the undertakings.<sup>101</sup> It does not appear that someone had alleged that the inadequate handling of personal data, as such, would constitute a restriction of competition or consumer harm in the given case. Instead, the protection of privacy seems to have been a side issue that was already handled through the relevant national rules in the case.<sup>102</sup> In my view, it is therefore unreasonable to draw the conclusion that the privacy aspects of the handling of data could never constitute an anti-competitive practice on the basis of *Asnef-Equifax*. The case simply did not concern that issue.

A more intriguing question is whether the actions involving data taken by a dominant undertaking in relation to end-consumers are at all relevant to antitrust analysis. Significantly, Article 102 TFEU does not prohibit a company from being in a dominant position but prohibits only the abuse of such a position. Thus, while the amount of data that a company has may be one factor relevant for establishing dominance, it is not enough. It is further required that the “handling of data”, as such, must be characterized as an abuse.

In the context of data cases, it is important to underline that end-consumers are rarely well-informed of the conditions that apply to the collecting and use of data by providers of applications, such as social networks, communication and search apps. The majority of consumers tend to uncritically accept conditions imposed by social media networks, such as Facebook. The rules on privacy, such as the GDPR,<sup>103</sup> set certain basic rules regarding information to consumers about the use of their personal data and grant them certain rights. However, this does not necessarily hinder undertakings from imposing conditions that either exploit consumers and/or restrict the rivalry from competing undertakings. The

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<sup>100</sup> Case C-238/05 *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v Asociación de Usuarios de Servicios Bancarios (Ausbanc)*, EU:C:2006:734, para 63.

<sup>101</sup> Opinion of Mr Advocate General Geelhoed, Case C-238/05 *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v Asociación de Usuarios de Servicios Bancarios (Ausbanc)*, ECLI identifier: ECLI:EU:C:2006:440, para 56.

<sup>102</sup> *Ibid.*

<sup>103</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation), OJ [2016] L 119/1.

question thus becomes whether the case law allows room for such conduct to be characterized as abuse.

It is important to note that even if the competition rules, in general, have the aim of protecting competition and *consumer welfare*, the term generally refers to the harm the criticized conduct indirectly has on consumers due to, e.g., increased prices following the elimination of competition in the market. Cases concerning anti-competitive conduct explicitly directed towards end-consumers are practically non-existent.

In one such rare case, *Football World Cup*, the Commission found that the conditions imposed on consumers (living outside the country hosting the sporting event) regarding football tickets were discriminatory.<sup>104</sup> The defendant argued that the conduct did not lead to any commercial or competitive benefits for the dominant undertaking or that it would affect the structure of the market. Nonetheless, the Commission found that the conduct directly harmed end-consumers and constituted abuse<sup>105</sup> which was sufficient and that there was no requirement for the dominant undertaking to acquire a benefit or commercial advantage.<sup>106</sup>

Arguably, the decisive factor in *Football World Cup* was discrimination on the basis of nationality, which resulted in an extensive application of Article 102 TFEU. If this interpretation is correct, an extensive application of the concept of abuse to capture all exploitation of consumers through unfair conditions, e.g., regarding data, would be "novel" in light of previous case law and practice. This is the reason why the German Facebook decision<sup>107</sup> is so controversial as the German Competition Authority seems to have made such a "novel" interpretation in the case. However, it is important to note that the German Competition Authority did not exclusively base its reasoning on the exploitation of consumers. It also found that the unauthorized use of data through the excessive conditions imposed on users of Facebook gave it an advantage over its competitors.

As regards mergers, data may constitute a relevant factor for establishing whether, e.g., the acquisition of a company may result in a dominant position. However, the blocking of a merger transaction also requires that the Commission demonstrate that the merging parties in the future will be able to behave in such a way as to cause consumer harm. Consumer harm is normally evaluated by

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<sup>104</sup> Commission Decision, 1998 *Football World Cup*, OJ [2000] L 5/55 (*Football World Cup*).

<sup>105</sup> *Football World Cup*, recital 100, cross-referencing to Case 6/72 *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities*, EU:C:1973:22, para 26.

<sup>106</sup> *Football World Cup*, recital 102.

<sup>107</sup> Bundeskartellamt, Case B6-22/16, Facebook, see press release at [https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf;jsessionid=A82BB51FC236DE99DEDBBF794E961517.1\\_cid378?\\_\\_blob=publicationFile&cv=4](https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf;jsessionid=A82BB51FC236DE99DEDBBF794E961517.1_cid378?__blob=publicationFile&cv=4) (*Facebook*).

looking at the merging parties' ability to raise prices and reduce output. Thus, in data cases, the difficult question is whether future actions by the merging parties – such as a change of conditions in the handling of personal data or the cross-use of data between two apps made possible by the merger – are relevant for the assessment. Similar to the application of the prohibition of abuse of a dominant position, this raises the question whether the inadequate handling of data may constitute consumer harm.

Looking at the merger practice of the Commission, it seems that there are few cases where data has played a decisively important role. In fact, most merger transactions concerning markets where data was important were approved without any further requirements. Of these cases, the most interesting (and criticized) case is *Facebook/WhatsApp*.<sup>108</sup> The Commission approved the transaction after finding that the merging parties would not be able to match user accounts between the two apps. Third parties had claimed that matching the accounts could lead to competitive concerns, which was exactly what happened post-merger. The case has been criticized on the grounds that the Commission did not correctly assess the strategic value of data and the importance of data protection.<sup>109</sup> If that criticism is correct, it could be argued that the application of the rules on Merger Control are necessary in order to deal with the accumulation of data and market power in order to protect consumers. An argument for applying the competition rules to issues concerning data is that other rules were unable to prevent the harmful actions against consumers. In this context, even if data protection rules are followed, data could still be accumulated by merger transactions and result in harm to consumers. Moreover, if consumers are unable to punish suppliers of digital services because there are no substitutes, it seems to contravene the goals of competition law to exclude such harm from the concept of consumer harm even if increased prices are not the end result.

It follows that the analysis of anti-competitive effects of the conduct by dominant undertakings and merger transactions under the current approach fits uneasily with the problems raised by cases concerning data. To capture these cases with the competition rules would require novel interpretations, as was done in the German Facebook decision. The danger with such an approach is that the competition rules could be “diluted” and assume the character of general “consumer protection” law. This may have two negative effects. Firstly, it could impact the accuracy of the competition rules, thus contravening the goals of competition law. Importantly, while this contribution has underlined the dangers regarding the use and handling of data, the success of the tech giants is due to their ability to offer better targeted services and develop better products with the use of data. An overly extensive interpretation of the competition rules

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<sup>108</sup> Case COMP/M.7217 Facebook/WhatsApp (Facebook/WhatsApp).

<sup>109</sup> E Deutscher, “How to measure privacy-related consumer harm in merger analysis? – A critical reassessment of the EU Commission’s merger control in data-driven markets” (2018), EUI Working Papers Law 2018/13, 9.

could suppress methods of competition that as a whole and in the long run are good for competition, the market and consumers. Secondly, an overly extensive interpretation of the competition rules in data cases could be seen as the influence of external policies on competition law. In this context, it is noteworthy that the tech giants consist of a group of primarily American firms. To interpret the competition rules beyond their goals could be seen as a “political” measure primarily aimed at dealing with strong companies coming from outside the EU. Obviously, it would be problematic to use competition law as an instrument for strictly “political” or protectionist purposes.

In conclusion, it is clear that data cases pose challenges to the interpretation and application of EU Competition Law. However, the analysis above demonstrates that there is no need to take external policies such as consumer protection into consideration to capture problematic data cases. This contribution endorses the approach in the German Facebook decision which focused on market power and the possibility of exploiting that market power when dealing with issues regarding the handling of user data. Such an approach arguably does not open the door for the influence of external policies or the pursuit of political and protectionist agendas. Again, the answer to potential underenforcement of competition law in data cases is a recalibration of the rules rather than changing the role of competition law as a matter of EU industrial policy. While such an approach may require innovative interpretations of EU Competition Law, it may still be applied while staying faithful to the goals of competition law and excluding other industrial policy considerations.

### 3.4.2 The possibility of blocking mergers to avoid non-European influence over sensitive sectors

The Merger Regulation provides the possibility of blocking mergers for other reasons than pure competition concerns.<sup>110</sup> This is an exceptional rule in EU Competition Law because it permits external policies to explicitly override the competition law evaluation of merger transactions. This possibility is given to the Member States, although the exercise of this exception in some cases is under the supervision of the Commission.<sup>111</sup> Member States may take appropriate measures to protect legitimate interests when such measures are compatible with general principles and other provisions of EU law.<sup>112</sup> Public security, plurality of the media and prudential rules are characterized as legitimate interests. In addition, Member States may also claim other legitimate interests, but only on the condition that Member States communicate the legitimate interest to the Commission. In theory, the scope of the exemption seems wide because there are no formal boundaries to which interests may be invoked as legitimate. However, in practice, the exception has been very little used, and when used,

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<sup>110</sup> Merger Regulation, Article 21(4).

<sup>111</sup> Merger Regulation, Article 21(1).

<sup>112</sup> Merger Regulation, Article 21(4).

mostly unsuccessfully. Cases such as *E.ON/Endesa* which concerned *inter alia* public security concerns regarding the supply of energy demonstrate that the Court has been quite strict when evaluating the necessity and proportionality of conditions imposed by Member States for permitting a merger transaction

in individual cases.<sup>113</sup> Accordingly, while the Merger Regulation theoretically offers an opportunity for Member States to block mergers in relation to foreign investors coming from third countries when this endangers certain legitimate interests, it seems that the practical possibility of invoking that exemption is limited. However, it must be underlined that the existing practice does not really go into the issues that have recently been raised concerning the threat that state-controlled undertakings from third countries may pose to certain key sectors and markets of the Member States. As painfully illustrated by the Covid-19 outbreak, the lack of control by Member States over certain sectors, key assets and infrastructure may in exceptional circumstances threaten self-sufficiency in manufacturing and the reliability of supply chains in the provision of essential goods and services, such as medical equipment.

In light of this problem, the EU has recently adopted a regulation according to which the Member States have the right to screen investments from third-country investors on the grounds of public security and public order (FDI Screening Regulation).<sup>114</sup> There are two interesting aspects of this regulation. Firstly, there is an alignment between the FDI Screening Regulation and the rules on Merger Control. According to recitals of the FDI Screening Regulation, it shall not prejudice the application of the Merger Regulation, and the two regulations should be interpreted in a consistent manner. Secondly, the regulation on the screening of foreign direct investment imposes an obligation on Member States to notify the Commission and other Member States of investments that undergo screening, and it shall be indicated whether the foreign direct investment is likely to fall within the scope of the Merger Regulation.

This alignment may be interpreted as a clarification (and extension) of what may be considered as legitimate interest under the Merger Regulation.<sup>115</sup> It is stated in the FDI Screening Regulation that Member States may assess the likelihood of an investment constituting a problem for public security and public order by looking at the potential effects on a number of different factors, e.g., critical infrastructure, critical technologies, supply of critical inputs and access to certain information.<sup>116</sup> Moreover, in the evaluation of effects on public security

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<sup>113</sup> Commission Decision, *E.ON/Endesa*, Case no. COMP/M.4197, C(2006) 7039 Final. See also Commission Decision, *ENEL/Acciona/Endesa*, Case COMP/M.4685, C (2007) 5913 Final.

<sup>114</sup> Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, PE/72/2018/REV/1, OJ [2019] L 79I/1 (FDI Screening Regulation).

<sup>115</sup> Merger Regulation, Article 21(4).

<sup>116</sup> FDI Screening Regulation, Article 4.

and public order, Member States can take into account the fact that the foreign investor is state-controlled. Arguably, the FDI Screening Regulation could facilitate Member States in arguing that foreign direct investments will have potential detrimental effects on public security and public order. To what extent that conclusion is correct or not can only be demonstrated by future case law. In conclusion, the Merger Regulation, as such, provides a limited possibility for Member States to block mergers on the grounds that state-controlled companies may acquire control of important undertakings in sensitive markets. However, with the adoption of the FDI Screening Regulation, the potential for the Member States to use the exception in the Merger Regulation has probably been widened.

### 3.5 Conclusions and policy recommendations

The main question addressed in this contribution is whether there are problems with the present application of the EU competition rules in relation to the objectives pursued by EU industrial policy. Three broader issues have been analysed, and this section presents the conclusions drawn in the previous chapters.

The first issue concerns the *possible overenforcement of the competition rules on Merger Control*, which could hinder the growth of undertakings through structural changes in the form of merger transactions. The conclusion is that in theory, there may be a problem with a too strict application of the competition rules, but in practice, it is unlikely that this would have such a serious impact on the competitiveness of European industry. As found above, there is a risk that the Commission may underestimate the impact of potential competition when assessing the competitive effects of merger transactions, which in turn may result in an overestimation of the strength of merging parties and the blocking of merger transactions. In addition, the Commission is probably too strict when evaluating the benefits of a merger alleged by the merging parties. In particular, the high threshold for finding that a merger benefits consumers may result in the blocking of mergers that result in efficiencies and increased competitiveness of the merging parties. While these two points indicate that the Commission's approach may result in overenforcement, it seems unlikely that the practical application would genuinely constitute a threat to the competitiveness of European industry. The number of mergers transactions that have been blocked by the Commission is simply too low.

The second issue concerns the potential *underenforcement of the rules on Merger Control and the prohibition of abuse of a dominant position in digital markets*. In particular, the effects of mergers or potentially anti-competitive behaviour by dominant firms may be underestimated as the tools in competition law, such as market definition, may not adequately measure market power in digital markets. The emergence of ecosystems makes it difficult for competition authorities that apply a traditional analysis to capture the leveraging of market power from the

core markets of an ecosystem to other or new markets where the presence of the company in question is either weak or non-existent at the time a practice or a merger transaction takes place. Moreover, in the area of Merger Control, the transactions may sometimes involve the acquisition of a company that is so small in terms of turnover that the transaction may completely fall outside the scope of both EU and national rules on merger control. Obviously, these problems may mean that EU Competition law does not reach its internal goal of protecting competition in the internal market. This is also a problem for EU Industrial policy because the creation, consolidation and strengthening of market power in European tech markets will suppress the entry and growth of competitive firms in those markets, which is particularly problematic if the companies dominating those industries are of non-European origin. In part, the Commission and individual Member States have already attempted to address these problems by amending the rules as well as the analysis in Merger Control. Both Germany and Austria have widened the scope of Merger Control to capture merger transactions in which the turnover of one of the merging parties is small but the value of the transaction is high. Such a solution for EU Merger Control is also endorsed in this contribution. In addition, the Commission has also applied more forward-looking (and speculative) analysis to capture mergers in which the position of the merging parties at first sight seems unproblematic but which in the long run may restrict competition through the elimination of a potential competitor. While such a solution is also endorsed here, it must be emphasized that the Commission should also be more receptive to arguments by the merging parties about the efficiencies of such mergers in order to avoid the problem with overenforcement previously addressed. If the Commission is less rigorous in its own analysis of future anti-competitive effects of a merger, it should be equally generous towards the merging parties' arguments on the future benefits of the merger.

The last issue discussed concerns whether the application of competition law should be influenced by policies that are external (external policies) in the sense that they do not easily square with the policies and goals pursued by the competition rules. From an industrial policy perspective, this issue concerns where to draw the line between the scope of the competition rules and external policies pursued by other rules. As pointed out in the introductory chapter, most competition lawyers argue for keeping competition law clean from external policies. Competition law needs to be flexible as it applies to a variety of markets and market conditions. Consequently, competition law rules are often open-ended, and the interpretation and application are often contextual in individual cases. To prevent flexibility in competition law from being used for protectionist purposes or to pursue the politics of the day, the interpretation of competition law has been founded on economic theory and economic reasoning in order to pursue the specific goals of competition law, which in turn supposedly promote the competitiveness of European industry by protecting competitive markets. From an industrial policy perspective, to dilute the purpose of competition rules by letting external policies influence the application of those rules would risk an

outcome counterproductive to the specific role of competition law within the wider framework of EU industrial policy.

Two specific situations regarding competition law and the influence from external policies have been discussed in this contribution. Firstly, it was discussed whether the prohibition of an abuse of a dominant position should consider breaches of data protection rules when evaluating whether a practice should be classified as an abuse, as was done by the German competition authorities in the Facebook decision. As a starting point, it was found that the legality or illegality of an action under rules other than competition law, as such, does not provide an answer as to whether the behaviour should or should not be classified as abuse. Additionally, it was also found that previous case law has made the evaluation under competition law in line with its pursued goals and its classifications of anti-competitive behaviour, irrespective of the legality of the specific behaviour according to other rules. In other words, so far there have been no cases where external policies have had an impact on the interpretation regarding the prohibition of an abuse of a dominant position. It was also concluded that there is no need to consider data protection as an external policy since cases such as Facebook, which involve dominant firms and the handling and use of personal data, could be resolved by an interpretation faithful to the internal goals of competition law. In my view, if consumers are unable to “punish” the undertaking because it offers a must-have service (like Facebook) or if the remedies under data protection law are insufficient to deter a company with market power from breaching the rules, there is a sufficient nexus to market power. Accordingly, in these cases, competition law should not consider external policies.

Secondly, this contribution also addressed the perceived problem of merger transactions involving state-controlled undertakings from third countries, as it could lead to specific markets, sectors or infrastructure that are sensitive to the Member States being *de facto* controlled or influenced by foreign governments and interests. In this context, there is a rule in the Merger Regulation that permits the explicit balancing of certain public interests against the application of Merger control. This is a rarity in competition law because it permits external policies to be considered and, in the extreme, to override the application of competition law to merger transactions. In the past, the Commission and the Court of Justice have interpreted this rule narrowly, and the rule has been very little used. However, the adoption of the FDI Screening Regulation arguably opens up and facilitates the application of the rule in the Merger Regulation that allows the Member States to block merger transactions that constitute a threat to certain legitimate interests. If the Commission does not apply a too-strict standard, it should allow sufficient room for the Member States to protect the essential interests that may come under threat if controlled by non-European companies. Accordingly, without knowing how the new FDI Screening Regulation will impact the application of the Merger Regulation, there is no need, at the moment, to introduce additional measures.

All in all, the overall conclusion is that it seems unlikely that the overenforcement of competition law would seriously hold back the competitiveness of European industry, even though certain aspects of Merger Control may be criticized as being too strict. Instead, it seems that the main problem may be the underenforcement of the competition rules in digital markets, including certain practices relating to data protection that are applied to consumers by dominant undertakings. None of these issues, however, lend support to the consideration of policies that are external to the competition rules. Rather, all issues could be solved by recalibrating the interpretation of the competition rules. The only instance where an explicit balancing between protection of competition and external policies may become relevant concerns the involvement of third-country, state-controlled companies in merger transactions. However, as regards this particular issue, the tools to remedy the problem are already in place and only the future application of these rules by the Commission and the Court of Justice will demonstrate whether additional measures are needed.

# 4 The EU state aid ban – a straitjacket for a successful European industrial policy?

*Jörgen Hettne*

## 4.1 Introduction

When the EU (or at the time the European Economic Community, EEC) was created, global trade was limited. The aim was, above all, to develop trade and economic integration between the 6 founding members, thereby creating long-term peace and prosperity. Importantly, the EU internal market was not created with the aim of enhancing the competitiveness of European companies globally. On the contrary, far-reaching competition rules were introduced, including a ban on state aid, in order to foster internal competition within the EU. This creation of a common competition policy has been a great achievement in terms of creating an effective internal market. The EU has developed into one of the world's largest free trade blocs. Simultaneously, the Union has contributed to the liberalisation of global trade.

However, the conditions for world trade have not developed in the same way as the conditions for internal trade within the EU. The World Trade Organisation (WTO), the most comprehensive legal order when it comes to global trade, does not contain a similar competition policy as within the EU and has limited powers to counteract anti-competitive subsidies and other kinds of state aids. Such differences in the regulation of European and global trade have created asymmetries that impact the competitiveness of European companies participating in the global market. The clearest example is the situation for European companies in comparison to Chinese ones. China's authoritarian state-capitalism not only allows for state aid but Chinese companies are also often state-owned.<sup>117</sup> In the past when European companies had supreme production capacity, technical know-how, etc., this problem was limited. Today, however, the situation has changed dramatically; the share of global EU exports has gradually decreased in favour of rapidly growing exports from emerging economies such as China.<sup>118</sup> This in turn poses a threat to

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<sup>117</sup> See Bacchus, J., Lester, S., and Zhu, H., *Disciplining China's Trade Practices at the WTO. How WTO Complaints Can Help to Make China More Market-Oriented*, in: Policy Analysis Cato Institute No. 856 (15 November 2018).

<sup>118</sup> Ambroziak, A. A., *State Aid Policy and Industrial Policy of the European Union*, in Amroziak, A.A. (ed.) *The New Industrial Policy of the European Union – Contributions to Economics*, Springer 2017 (e-book), loc 4126-4127.

European competitiveness on the global level. This development explains why interest in a more comprehensive European industrial policy is gaining increasing political support among the EU Member States.

Some of the Member States, with France being the most outspoken, have voiced their dissatisfaction with the liberal EU approach to industrial policy. As a consequence, an informal “Friends of Industry” group was established in 2012, which consisted of government representatives from several Member States.<sup>119</sup> The group stressed the need for measures improving the competitiveness of European companies. In this context, France claimed the state aid rules were “outdated rules that do not correspond to a global economy”.<sup>120</sup> The French Minister explained that “European rules are the rules of the old world” and argued that they prevent the emergence of European champions. He also stated that “in a globalised economy large countries (blocks) support their industry, and the EU should do the same instead of blaming other states who subsidize their industries”.<sup>121</sup> This approach was reflected in the joint letter of the “Friends of Industry”, urging that the effective monitoring of subsidies granted outside the EU should be established, i.e. arguing that the EU competition policy should ensure that European companies are not discriminated against by global competitors.<sup>122</sup> EU state aid rules should award subsidies to entrepreneurs if similar sectors receive financial support in third countries, regardless of whether a market failure existed in the EU.<sup>123</sup> The French Minister also claimed that the European Commission has accumulated too much power and that it should leave more room for national policy.<sup>124</sup>

However, it is not obvious how to handle this issue as it requires a fine balance between fair competition within the EU, on the one hand, and at the global level on the other. Although a number of Member States have put increasing pressure on the Commission to relax state aid rules and allow them to join the subsidy war in the global market, the liberal approach so far seems to remain steadfast.<sup>125</sup>

## 4.2 EU lacks competence as regards industrial policy

A vital question is therefore what kind of industrial policy is possible under

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<sup>119</sup> The Friends of Industry are described as a group of likeminded EU Member States that meet once a year to discuss recent developments related to industrial policy at the EU level. The latest achievement, the Vienna Declaration, was signed by Austria, Bulgaria, Croatia, Denmark, France, Germany, Greece, Italy, Latvia, Luxembourg, the Netherlands, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden. The group is inclusive and open to any Member State. See <https://www.bmdw.gv.at/en/Topics/Europe-and-EU/Austria-in-the-European-Union/Seventh-Friends-of-Industry-Ministerial-Conference.html>.

<sup>120</sup> Ambroziak, *op cit*, loc 2700-2708.

<sup>121</sup> *Ibid*.

<sup>122</sup> *Ibid.*, loc 2714-2719.

<sup>123</sup> *Ibid*.

<sup>124</sup> *Ibid.*, loc 2719-2727.

<sup>125</sup> *Ibid.*, loc 2868-2869.

the present EU treaties. The Treaty on the Functioning of the European Union (TFEU) contains a specific section on industrial policy, which indicates that the EU can act in this area. On closer reading, however, it is clear that the powers lie not so much with the EU as with the Member States. According to Article 173 TFEU:

1. The Union and the Member States shall ensure that the conditions necessary for the competitiveness of the Union's industry exist [...].
2. The Member States shall consult each other in liaison with the Commission and, where necessary, shall coordinate their action. The Commission may take any useful initiative to promote such coordination, in particular initiatives aiming at the establishment of guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation. The European Parliament shall be kept fully informed.
3. The Union shall contribute to the achievement of the objectives set out in paragraph 1 through the policies and activities it pursues under other provisions of the Treaties. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, may decide on specific measures in support of action taken in the Member States to achieve the objectives set out in paragraph 1, excluding any harmonisation of the laws and regulations of the Member States. This Title shall not provide a basis for the introduction by the Union of any measure which could lead to a distortion of competition or contains tax provisions or provisions relating to the rights and interests of employed persons.

Thus, the objectives of European industrial policy are outlined as a common responsibility of the EU and its Member States. This is also clearly reflected in the EU's policy practice, most notably in the context of the Europe 2020 Strategy of the Commission, which is addressed to both the Member States *and* the EU institutions.<sup>126</sup> However, it is clear that the implementation of this common policy is heavily dependent on concrete actions from individual Member States. In Article 173 TFEU, the following measures are outlined as tools that both the Union and the Member States can use:

- speeding up the adjustment of industry to structural changes,
- encouraging an environment favourable to initiative and to the development of undertakings throughout the Union, particularly small and medium-sized undertakings,

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<sup>126</sup> See Jansen, P., *The Interplay between Industrial Policy and State Aid: Natural Combination of Strange Bedfellows*, European State Aid Law Quarterly (ESTAL) no. 4, 2016, pp. 575-602, 576.

- encouraging an environment favourable to cooperation between undertakings,
- fostering better exploitation of the industrial potential of policies of innovation, research and technological development.

These actions fall mainly in the area of national competence. In addition, the Article emphasises that this should be carried out *in accordance with a system of open and competitive markets*, i.e. the omnipresent fair competition objective is particularly stressed. The industrial policy of the EU cannot therefore be used as a more precise tool to boost the competitiveness of European companies in the global market. A relatively large European company may still be a small player in the global market and EU competition policy fails to ensure that European companies are not discriminated against by global competitors. As pointed out by Professor of Economics Adam Ambroziak, the amendments introduced into the treaties regarding industrial policy have not changed the market-oriented approach to the economy and have therefore not jeopardised the strength of the state aid ban.<sup>127</sup>

### **4.3 The industrial policies of the Member States are circumscribed**

The fact that powers lie mainly with the Member States shall of course not be seen as a problem in itself. European companies are established in the Member States of the EU and these “home states” can therefore promote their companies’ competitiveness globally. However, as mentioned at the outset, it is not that simple. The fact that a company is financially supported to survive and compete globally normally means that it will also be strengthened in the European market and it is such distortions of competition that EU competition policy, in particular the rules on state aid, is intended to prevent. Article 107.1 TFEU stipulates that:

Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

Exemptions from this ban are specified in Articles 107.2 and 107.3 in the TFEU. The TFEU rules on state aid form a part of the internal market discipline ensuring inter alia that competition in the Single Market is not distorted. It is an area which forms parts of EU competition policy where the Union has exclusive competence (Article 3.1.b TFEU). State aid schemes shall not give certain companies unwarranted advantages that put market forces out of the running and which in turn are considered to reduce the general competitiveness of the EU. State aid may, above all, not be used to set up barriers hindering access to national markets within the EU. If competition is distorted in this way, there is

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<sup>127</sup> See Ambroziak, *op cit*, loc. 2496-2498.

a risk that customers may have to put up with higher prices, a deterioration in the quality of the products and less innovation.<sup>128</sup> The permissible exceptions to the state aid ban shall therefore always be beneficial to society in a manner that outweighs the possible distortion of competition in the internal market.

For that reason, exemption regulations provide very detailed criteria concerning eligible beneficiaries, maximum aid intensities (i.e. the maximum amount of financial resources in relation to the eligible costs of a project that can benefit from state aid) and eligible expenses. These conditions are based on the Commission's experience in assessing state aid projects notified by Member States. Following the establishment of certain thresholds, a list of eligible costs and expenditures, and the types and size of potential recipients of government interventions, the Commission has created a framework for "good" state aid which does not distort competition within the internal market and therefore does not require prior notification.<sup>129</sup>

Against this background, it is undoubtable that industrial policy decided from a national context is unlikely to be successful and may even be harmful from a European standpoint. If Member States consider industrial policy from a domestic perspective, the public's interests at the national and European levels typically differ. In particular, in times of economic difficulties, demand for action to safeguard national industry will certainly be voiced. At other times, however, the main interest in domestic politics tends to focus on the perceived interest of domestic firms and the strengthening of the national industrial base, even if market failures are absent and competition within the European market will be affected.<sup>130</sup>

Still, the Union has in some policy-oriented cases shown acceptance for such nationally oriented policies. However, this acceptance does not usually stem from the general exceptions in the Treaty, but rather from a special exemption decided by the Council.<sup>131</sup> For example, until the end of 2010, Council rules allowed for the subsidisation of coal mines, even if they were unprofitable.<sup>132</sup> The reason for this was to guarantee access to sufficient coal reserves and hence *securing the supply of energy* in the EU. However, after 2010 the Council changed the policy in light of its new focus on renewable energy sources. A sustainable and safe low-carbon economy no longer justified the indefinite support for

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<sup>128</sup> See the Commission State Aid Action Plan, COM (2005) 107 final, p. 4.

<sup>129</sup> Cf. Ambroziak, *op cit*, loc 2773-2777.

<sup>130</sup> Jansen, *op cit*, p. 577.

<sup>131</sup> See Article 107.3 e) exceptions for "such other categories of aid as may be specified by decision of the Council on a proposal from the Commission."

<sup>132</sup> Council Regulation (EC) No 1407/2002 of 23 July 2002 on State aid to the coal industry, OJ L 205, p. 1-8. I am grateful to Jansen for having provided this and other examples. See Jansen, *op cit*, p. 594.

uncompetitive coal mines.<sup>133</sup> Instead, the Council adopted a proposal to phase out aid to coal mines and linked the granting of aid to the closing down of inefficient mines, thereby interfering with the policies of some Member States.<sup>134</sup> Similar developments can be discerned as regards the steel<sup>135</sup> and shipbuilding industries.<sup>136</sup>

However, there are also examples where the Union has taken broader industrial interests into account. In the context of the State Aid Modernisation Programme (SAM),<sup>137</sup> the linking of competition to wider political priorities, including industrial policy ones, gained renewed momentum.<sup>138</sup> One of the key goals of the SAM Programme was to support the Europe 2020 Strategy and its flagship initiatives. By overhauling its block exemption and many of its frameworks and guidelines to make them consistent with the principles contained in the SAM Programme, the Commission made clear that one cannot look at the primary importance of the undistorted market within the EU without also looking at its global competitiveness.<sup>139</sup>

#### 4.4 External policies and the WTO

One additional factor in relation to the evaluation of national and EU competences as regards industrial policy is that aid for exports destined for countries outside of the EU is covered by the EU's Common Commercial Policy (CCP).<sup>140</sup> In this area, the EU has exclusive competence (as is also the case with competition policy, as mentioned previously). The CCP covers export policy, and thus systems of aid for exports, including export credits, insurance and guarantees. After the entry into force of the Lisbon Treaty, the Union also has express exclusive competence over foreign direct investment (FDI). Article 207 TFEU, which defines the CCP, covers State sponsored FDI insurance schemes. The main actor in this field is therefore the EU, not the Member

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<sup>133</sup> Council Decision of 10 December 2010 on State aid to facilitate the closure of uncompetitive coal mines 2010/787/EU, OJ L 336, p. 24-29, recital 3.

<sup>134</sup> Council Decision of 10 December 2010 on State aid to facilitate the closure of uncompetitive coal mines 2010/787/EU, OJ L 336, p. 24-29.

<sup>135</sup> See the Communication from the Commission - Rescue and restructuring aid and closure aid for the steel sector (notified under document No C(2002) 315), OJ C 70, 19.3.2002, p. 21-22; Communication from the Commission - Multisectoral framework on regional aid for large investment projects (notified under document No C(2002) 315), OJ C 70, p. 8-20.

<sup>136</sup> See the Framework on State aid to shipbuilding, OJ C 364, 14.12.2011 incl. the Communication from the Commission concerning the prolongation of the application of the Framework on State aid to shipbuilding (2013/C 357/01).

<sup>137</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on EU State Aid Modernisation, COM (2012) 209, para 12.

<sup>138</sup> See Jansen, *op cit*, p. 577.

<sup>139</sup> *Ibid.* p. 594.

<sup>140</sup> *Ibid.* p. 590.

States individually.<sup>141</sup> Moreover, at the international level, the EU is bound by the WTO Agreement on Subsidies and Countervailing Measures (the “SCM Agreement”), which has to be respected if state aids (subsidies) are involved.<sup>142</sup>

Against this background, in respect of aid for exports the EU has, on the basis of Article 207 TFEU, adopted Directive 98/29/EC<sup>143</sup> on the harmonisation of the main provisions concerning export credit insurance for transactions with medium and long-term cover and Regulation 1233/2011<sup>144</sup> on the application of certain guidelines in the field of officially supported export credits.<sup>145</sup>

The Union has long since favoured a rule-based multilateral trade system. It has supported trade negotiations within the Doha Development Round to further liberalise trade in goods and services, improve market access for developing countries and review trade rules. It is, however, clear that the multilateral approach has not yielded genuine progress over the years.<sup>146</sup> In response, a new EU strategy, launched in 2006, combined the multilateral approach with renewed efforts to forge bilateral trade relations, an approach supported in the Europe 2020 Strategy. Due to numerous declarations on the need for a new commercial policy, it is crucial to coordinate the EU’s approach to a more comprehensive external trade policy with its direct contribution to the EU’s competitiveness, both inside and outside the EU.<sup>147</sup>

Although there were no direct references to trade policy issues in the Europe 2020 Strategy, the European Council pointed out in its conclusions that all common policies, including the CCP, should support the effective implementation of the strategy.<sup>148</sup> Two years after the adoption of the Europe 2020 Strategy, the

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<sup>141</sup> Article 2(1) TFEU. Any other national rules and regulations related to export policy and FDI are by definition incompatible with EU law, irrespective of whether and when the EU exercises its competence. See Dimopoulos, A., “Foreign Investment Insurance and EU Law”, [2012] TILEC Discussion Paper 1, 13.

<sup>142</sup> The SCM Agreement creates two basic categories of subsidies: those that are prohibited and those that are actionable (i.e. subject to challenge in the WTO or to countervailing measures). The first category consists of subsidies contingent, in law or in fact, whether wholly or as one of several conditions, on export performance (“export subsidies”), see Article 3 of the SCM Agreement. A detailed list of export subsidies is annexed to the SCM Agreement.

<sup>143</sup> Council Directive 98/29/EC of 7 May 1998 on the harmonisation of the main provisions concerning export credit insurance for transactions with medium and long-term cover, OJ L 148, p. 22-32.

<sup>144</sup> Regulation (EU) No 1233/2011 of the European Parliament and of the Council of 16 November 2011 on the application of certain guidelines in the field of officially supported export credits, and repealing Council Decisions 2001/76/EC and 2001/77/EC, OJ L 326, p. 45-112.

<sup>145</sup> Jansen, *op cit.*, p. 590.

<sup>146</sup> See Gustyn, J., *The Common Commercial Policy and the Competitiveness of EU Industry* in Amroziak, A.A. (ed.) *The New Industrial Policy of the European Union – Contributions to Economics*, Springer 2017 (e-book), loc 3563-3568.

<sup>147</sup> *Ibid.*

<sup>148</sup> Conclusions from European Council 2010.

Commission also issued the communication “Trade, Growth and Development: Tailoring trade and investment policy for those countries most in need”.<sup>149</sup> The communication stresses the pivotal role of the multilateral approach and the need to strengthen the WTO.

However, the WTO has become much weaker of late, as demonstrated by the 2018 “tariff wars” between the US and China, which also included the EU. WTO modernisation is clearly on the agenda (inter alia the need for more coherent competition rules, the promotion of social adjustment to import competition and related technology challenges, and the protection of transnational rule of law and judicial remedies).<sup>150</sup> However, at present, the success of such a process is to say the least uncertain.

Therefore, a pressing issue is whether the EU’s CCP should be applied to bolster its foreign policy or to support its industrial goals. The CCP may obviously help meet the objectives of the Europe 2020 Strategy and have major input into the creation of a coherent industrial policy within the EU, but it may also be used as a stimulus for foreign initiatives. The question which arises is whether it can manage all these objectives simultaneously.<sup>151</sup>

#### **4.5 Is there a concealed European industrial policy?**

The EU state aid prohibition is, as explained previously, certainly not without exceptions. Over time, many national aid measures have been classified as “good aids” and compatible with the internal market. The institution which decides on whether an aid is good or bad is the Commission and only exceptionally the Council. Since the 2005 State Aid Action Plan (SAAP),<sup>152</sup> the analysis of the Commission has focused on *market failures*. It has clarified that the criteria for considering if an aid measure is compatible with the internal market are the following:<sup>153</sup>

- Contribution to a well-defined objective of common interest;
- Need for State intervention: it must be targeted towards a situation in which aid can bring about a material improvement that the market cannot deliver itself, by remedying a market failure or addressing an equity or cohesion concern;
- It must be an appropriate policy instrument to address the objective of common interest;

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<sup>149</sup> Communication (COM(2012) 22 final – Trade, growth and development – Tailoring trade and investment policy for those countries most in need.

<sup>150</sup> See Petersmann, E-U, *How should the EU and other WTO members react to their WTO governance and WTO Appellate Body crises?*, RSCAS 2018/71, p. 14.

<sup>151</sup> Gustyn, op cit, loc 3640-3644.

<sup>152</sup> Commission State aid action plan - Less and better targeted state aid: a roadmap for state aid reform 2005-2009 (Consultation document), COM (2005) 107.

<sup>153</sup> Jansen, op cit., 595.

- Incentive effect: the aid must change the behaviour of the undertaking concerned in such a way that it engages in additional activity that it would not carry out without the aid, or it would carry it out in a restricted or different manner or location;
- Proportionality: the aid amount must be limited to the minimum needed to induce the additional investment or activity;
- Negative effects on competition and trade between Member States must remain sufficiently limited, so that the overall balance of the measure is positive; and
- Transparency: the relevant acts and pertinent information about aid awards must be transparent.

These criteria have allowed for some considerations in relation to international competition. Indeed, the Commission has long since recognised that state aid plays a key role in industrial policy, yet in a community rather than a national fashion.<sup>154</sup>

One illustrative example is the present guidelines for environmentally motivated state aid.<sup>155</sup> The Commission accepts that in order to prevent indirect carbon leakage and maintain the competitiveness of EU undertakings vis-a vis undertakings based in third countries, both under the EU emissions trading scheme guidelines (ETS guidelines) and the chapter of the new Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG) dealing with energy intensive users, Member States may provide “operating aid” to certain energy intensive users, even though operating aid does not normally fall within the scope of the exceptions outlined in Article 107(3) TFEU. On the basis of the ETS guidelines, Member States are furthermore permitted to compensate certain electro-intensive users, such as steel and aluminium producers, for part of the higher electricity costs due to the ETS.

The concern is here that competitors from third countries do not face similar CO<sub>2</sub> costs in their electricity prices.<sup>156</sup> Under the EEAG, limited support is also allowed for energy intensive sectors, such as the manufacturing of chemicals, paper, ceramics or metals. These sectors carry a relatively high burden from levies charged for renewables support because they are intensive electricity users. Finally, the exposure of these sectors to global trade puts them at a disadvantage towards competitors from outside the EU where electricity prices are lower.<sup>157</sup> Hence, by adopting these rules the Commission has accepted that in certain

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<sup>154</sup> Se López, J. J. P., *The Concept of State Aid Under EU Law: From internal market to competition and beyond*, Oxford University Press 2015, p. 203-204.

<sup>155</sup> I am grateful to Jansen for pointing out these highly interesting examples, see Jansen, op cit, p. 597.

<sup>156</sup> ETS guidelines, para 24.

<sup>157</sup> Communication from the Commission – Guidelines on State aid for environmental protection and energy 2014-2020, OJ C 200, 28.6.2014, p. 1-55, par. 3.7.

cases one cannot look just at the primary importance of the undistorted market within the EU but must also look at global competitiveness.<sup>158</sup>

These developments demonstrate how the Commission can use its discretionary powers under Article 107(3) TFEU to govern and shape the Member States' industrial policy, in particular structural changes in relation to climate considerations, and take global competition into account.<sup>159</sup>

Based on a comparatively wide interpretation of Article 107(3)(c) TFEU, these environmentally friendly industrial objectives are considered compatible with the internal market. However, they must contribute to the EU environmental or energy objectives without adversely affecting trading conditions contrary to the common interest.<sup>160</sup>

According to the legal scholar Pim Jansen, state aid policy is in this way instrumental in furthering the objectives of the Europe 2020 Strategy and its "Resource efficient Europe" flagship initiative<sup>161</sup> on the basis of which a number of headline targets have been set, including targets for climate change and energy sustainability, and implementing policies have been developed to support a shift towards a resource efficient and low-carbon economy.

Christian Koenig, Professor of Law at the University of Bonn, has on this basis concluded that "State aid law has evolved [in] to a regulatory and policy making tool rather than a mere monitoring and law enforcement tool preventing isolated distortive State aid measures granted by Member States."<sup>162</sup>

In the same vein, the Commission recently stated that throughout its long history, industry has proven its ability to lead change. It must now do the same as Europe embarks on its transition towards climate neutrality and digital leadership in an ever-changing and ever more unpredictable world. According to the Commission, these transitions will take place in a time of moving geopolitical plates which affect the nature of competition. The need for Europe to affirm its voice, uphold its values and fight for a level playing field is more important than ever. The Commission emphasises that this is about Europe's sovereignty.<sup>163</sup>

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<sup>158</sup> Jansen, op cit., p. 597 ff.

<sup>159</sup> Ibid.

<sup>160</sup> EEAG guidelines, para 23.

<sup>161</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Roadmap to a Resource Efficient Europe, COM (2011) 571 final.

<sup>162</sup> Koenig, C., *Where is State Aid Law Heading To* (2014) 13(4) European State Aid Law Quarterly 611.

<sup>163</sup> Communication from the Commission to the European parliament, the European Council, the European Economic and social committee and the Committee of the regions – A New Industrial Strategy for Europe, COM(2020) 102 final, p. 1.

## 4.6 The IPCEI Communication

The state aid exception which seems to coincide best with the interest of a European industrial policy is the exception for the support of *common European interest*. Pursuant to the first limb of Article 107(3)(b) TFEU “*aid to promote the execution of an important project of common European interest*” could be considered to be compatible with the internal market. As previously demonstrated in the judgment by the Court of Justice of the European Union (CJEU), *Exécutif régional wallon v Commission*, the threshold to make use of this exception is quite high.<sup>164</sup> With the adoption of the IPCEI Communication (now under revision),<sup>165</sup> the assessment of public financing of such projects has been updated and consolidated in line with the Europe 2020 Strategy objectives, including the EU’s flagship initiatives. In particular, these guidelines concern large-scale, high risk advanced sectors with a pan-European dimension.

In its Communication on a new industrial strategy for Europe, the Commission stresses that mobilising private investment and public finance is acutely important where there are market failures, especially for large-scale deployment of innovative technologies. According to the Commission, Member States can use IPCEIs to pool financial resources, act quickly and connect the right players along key value chains. They are a catalyst for investment and allow Member States to fund large-scale innovation projects across borders in case of market failures. Building on experience with recent IPCEIs, the Commission will explore ways to combine national and EU instruments to leverage investment across the value chain, in full respect of relevant financial and competition rules. To help make the most out of this tool, the Commission will put in place revised State aid rules for IPCEIs in 2021.<sup>166</sup>

It is, however, clear that the IPCEI Communication, at least at present, focuses on the internal market of the EU rather than the global one. In paragraph 2, the Communication states that IPCEIs may represent a highly significant contribution to economic growth, jobs and competitiveness for the Union industry and its economy in view of their positive spillover effects *on the internal market and the Union society*. Furthermore, an IPCEI must represent an important

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<sup>164</sup> Joined cases C-62/87 and C-72/87, *Exécutif régional wallon v Commission*, paras 21, 23-25.

<sup>165</sup> Communication from the Commission on criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest (EUT 2014, C 188, p. 2).

<sup>166</sup> Communication from the Commission to the European parliament, the European Council, the European Economic and social committee and the Committee of the regions – A New Industrial Strategy for Europe, COM(2020) 102 final, p. 12.

contribution to the *Union's objectives in general* (para 15).<sup>167</sup> The benefits of the project must not be limited to the undertakings or to the sector concerned but must be of wider relevance and application to the European economy or society through positive spillover effects (such as having systemic effects on multiple levels of the value chain, up- or downstream markets, or having alternative uses in other sectors or modal shift) which are clearly defined in a concrete and identifiable manner (para 17). Projects comprising industrial deployment must allow for the development of a new product or service with high research and innovation content and/or the deployment of a fundamentally innovative production process. Regular upgrades without an innovative dimension of existing facilities and the development of newer versions of existing products do not qualify as IPCEI (para 22). International competition is only mentioned in paragraph 34 where it is stated that:

In order to address actual or potential direct or indirect distortions of international trade, the Commission may take account of the fact that, directly or indirectly, competitors located outside the Union have received (in the last three years) or are going to receive, aid of an equivalent intensity for similar projects. However, where distortions of international trade are likely to occur after more than three years, given the particular nature of the sector in question, the reference period may be extended accordingly. If at all possible, the Member State concerned will provide the Commission with sufficient information to enable it to assess the situation, in particular the need to take account of the competitive advantage enjoyed by a third country competitor. If the Commission does not have evidence concerning the awarded or proposed aid, it may also base its decision on circumstantial evidence.

The opportunities to take global competitiveness into account are thus rather limited. Moreover, it is only certain costs that can be covered. Eligible costs are mentioned in a special annex.

#### **4.7 EU funding**

Finally, it is important to add that the EU's own resources can be a useful source in financing important industrial policy projects. The ban on state aid in Article 107 (1) TFEU refers only to aid granted "by a Member State or through State resources." Aid granted only by the EU itself is therefore not covered by this provision. EU funding managed by EU institutions, agencies or other bodies of the EU, which are not directly or indirectly controlled by the Member States, is therefore a potential industrial policy tool. The IPCEI Communication

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<sup>167</sup> The Communication mentions, for instance, the Europe 2020 Strategy, the European Research Area, the European strategy for KETs, the Energy Strategy for Europe, the 2030 framework for climate and energy policies, the European Energy Security Strategy, the Electronics Strategy for Europe, the Trans-European Transport and Energy networks, the Union's flagship initiatives such as the Innovation Union, Digital Agenda for Europe, the Resource Efficient Europe and the Integrated Industrial Policy for the Globalisation Era.

mentions that the Commission will take a more favourable approach where a project involves co-financing by a Union fund. One example of relevant EU funding in this context is the establishment of the two satellite programmes, Galileo<sup>168</sup> and Copernicus,<sup>169</sup> which provide funds for research and development activities within Horizon 2020.<sup>170</sup> Other examples are:

- The Programme for the Competitiveness of Enterprises and Small and Medium-sized Enterprises (COSME);<sup>171</sup>
- The European Structural and Investment Funds (ESI Funds) inter alia comprising the European Regional Development fund (ERDF), European Social Fund (ESF), Cohesion Fund (CF) and the European Agricultural Fund for Rural Development (EAFRD) and including the overarching Regulation (EU) No 1303/2013,<sup>172</sup> known as the Common Provisions Regulation (CPR);
- The European Fund for Strategic Investment (EFS I);<sup>173</sup> and
- The Connecting Europe Facility (CEF).<sup>174</sup>

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<sup>168</sup> Regulation (EU) No 1285/2013 of the European Parliament and of the Council of 11 December 2013 on the implementation and exploitation of European satellite navigation systems and repealing Council Regulation (EC) No 876/2002 and Regulation (EC) No 683/2008 of the European Parliament and of the Council, OJ L 347, p. 1-24.

<sup>169</sup> Regulation (EU) No 377/2014 of the European Parliament and of the Council of 3 April 2014 establishing the Copernicus Programme and repealing Regulation (EU) No 911/2010 Text with EEA relevance OJ L 122, p. 44-66.

<sup>170</sup> See inter alia Regulation (EU) No 1291/2013 establishing Horizon 2020 – the Framework Programme for Research and Innovation (2014–2020); Regulation (EU) No 1290/2013 laying down the rules for participation and dissemination in Horizon 2020; Decision establishing the specific programme implementing Horizon 2020; Regulation (EU) No 1292/2013 establishing the European Institute of Innovation and Technology; Decision No 1312/2013/EU on the strategic innovation agenda of the European Institute of Innovation and Technology (EIT): the contribution of the EIT to a more innovative Europe.

<sup>171</sup> Regulation (EU) No 1287/2013 of the European Parliament and of the Council of 11 December 2013 establishing a Programme for the Competitiveness of Enterprises and small and medium-sized enterprises (COSME) (2014–2020), OJ L 347, p. 33.

<sup>172</sup> Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006, OJ L 347, p. 320-469.

<sup>173</sup> Regulation (EU) 2015/1017 of the European Parliament and of the Council of 25 June 2015 on the European Fund for Strategic Investments, the European Investment Advisory Hub and the European Investment Project Portal and amending Regulations (EU) No 1291/2013 and (EU) No 1316/2013 – the European Fund for Strategic Investments, OJ L 169, p. 1-38.

<sup>174</sup> Regulation (EU) No 1316/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Connecting Europe Facility, amending Regulation (EU) No 913/2010 and repealing Regulations (EC) No 680/2007 and (EC) No 67/2010, OJ L 348, p. 129–171.

The competences on which these initiatives to provide monetary support are based can inter alia be found in the titles in the TFEU on “Industry”, but also under “Economic, social and territorial cohesion”, “Research and technological development and space” and “Trans-European networks”.<sup>175</sup> However, in line with the final sentence of Article 173(3) TFEU, the conditions for EU funding are carefully drafted in order to ensure that funding will not lead to a *distortion of competition within the internal market*.

#### 4.8 Conclusions

It has often been claimed that industrial policy and competition policy are incompatible with each other, because there would be an inherent contradiction in maintaining competition within the EU whilst at the same time preserving and encouraging the competitiveness of the EU’s industry vis-a-vis the rest of the world.<sup>176</sup> The Commission, by contrast, maintains that competition policy and industrial policy are considered different albeit closely related features of one idea; both would make European firms more efficient and prepare them for EU-wide competition, thereby equipping them for global competition.<sup>177</sup> It has been shown that the system of EU State aid control aims at striking a careful balance between European unity and national sovereignty. This entails that, while decisions to provide aid are in principle made by the Member States, the present EU legal framework generates a number of systemic obstacles that can preclude or limit the adoption and application of national industrial policy measures that entail monetary support, in particular those that are based on the interpretation of industrial policy in a purely domestic sense.<sup>178</sup>

However, while the Commission has always had to balance the general prohibition of State aid against possible exceptions in Article 107(3) TFEU, by inviting Member States to provide “good aid”, as opposed to “bad aid”, as exemplified by the SAM Programme, which, in turn, has been highly influenced by the Europe 2020 Strategy, the EU increasingly policy-governs the structural industrial change in the Member States.<sup>179</sup> This, in combination with the creation of multiple EU funding possibilities aiming to positively contribute to the objectives of said Europe 2020 Strategy, enables the Commission to increasingly use State aid policy measures as a public governance instrument to create positive European industrial policy in the absence of a powerful European industrial policy in itself.<sup>180</sup> In its Communication on a new industrial strategy for Europe,

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<sup>175</sup> See Jansen, op cit., p. 581.

<sup>176</sup> For a discussion of this traditional view, see, for example, Sauter, W., *Competition Law and Industrial Policy in the EU*, Oxford University Press 1997, p. 3. See also Lane, R., *New Community Competences under the Maastricht Treaty* (1993) 30(5) Common Market Law Review 939, 966.

<sup>177</sup> Jansen, op cit., p. 579-580.

<sup>178</sup> Ibid., p. 600.

<sup>179</sup> Ibid., p. 578.

<sup>180</sup> Ibid., p. 600

the Commission also admits that the EU should not be naïve to threats to fair competition and trade.<sup>181</sup>

Nonetheless, this hidden or concealed European industrial policy fits poorly with the Treaty provisions in this area which emphasise the national sphere of decision-making. This begs the question of whether this competence mismatch in Union policy making is sustainable in the long run. Even if an industrial policy becomes increasingly visible, it is mainly based on exceptions (in this context, the focus has been on exceptions to the state aid ban). Facing these realities, it seems that the Member States do not have anything to lose in strengthening the Union's competence regarding industrial policy in Article 173 TFEU, turning the exceptions to the state aid ban (controlled mainly by the Commission) into a more coherent European industrial policy (which would finally be decided upon by the Council and the European Parliament). While Member States presently are making use of the relaxed state aid rules in order to guarantee liquidity for all companies heavily affected by the economic fallout of the Covid-19 outbreak, in the long run the EU needs a coherent industrial policy which is adaptive to geopolitical changes in the world, demonstrated recently by the Chinese Belt and Road Initiative, President Trump's mercantilist approach to trade policy as well as Brexit. A coherent European industrial policy must also, and to a large extent, include a forward-looking external trade policy, making a stronger contribution to the EU manufacturing sector's engagement in the global economy.<sup>182</sup> It should increase the external competitiveness of EU industries and further the development of trade and investment (also through EU funding), rather than relying on increased protectionist measures and intensified interventions.<sup>183</sup> It is in this context unreasonable to have exactly the same assessment criteria for aid that will benefit the global competitiveness of European companies and aid which concerns only the competitive conditions within the EU. Market failures could also be assessed in a global perspective.

Such a policy may to some extent be adopted under Article 173.3 TFEU as a *specific measure* coordinating and supporting national industrial policies. It should encompass geopolitical strategies, competition and trade considerations, and in light of this define important projects of common European interest. A first step in this direction is possibly visible in the new industrial strategy for Europe where the Commission sets out to work closely with an inclusive and open *Industrial Forum* consisting of representatives from industry, including small and medium-sized enterprises, big companies, social partners, researchers, as well as Member States and EU institutions. Where needed, experts from specific sectors will be called

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<sup>181</sup> Communication from the Commission to the European parliament, the European Council, the European Economic and social committee and the Committee of the regions – A New Industrial Strategy for Europe, COM(2020) 102 final, p. 6.

<sup>182</sup> Gustyn, op cit., loc 4335-4336.

<sup>183</sup> Ibid., loc 4348-4351.

upon to share their knowledge. According to the Commission, this support could take the shape of regulatory action, unlocking financing or making the most of trade defence instruments. This would then form a dedicated toolbox. Progress will be monitored on a rolling basis, in cooperation with the European Parliament and the Council.<sup>184</sup> The Commission will also strive to increase the political ownership of the industrial strategy, suggesting a standing progress point at the Competitiveness Council and at the European Parliament.<sup>185</sup> However, such a policy would be more solid if the underlying competence of the Union is strengthened, making European industrial policy a key concern of the Union, which would require a change in the Treaty.

Finally, a European industrial policy must respect the commitments under the WTO and external trade agreements. The Commission affirms that the rules-based multilateral trading system and the WTO are indispensable to ensure open markets and a level playing field. The EU will therefore continue efforts to uphold, update and upgrade the world trading system so it is fit to address today's challenges and tomorrow's realities.<sup>186</sup> The potential use of a more aggressive European industrial policy could however be needed in times in which the rule-based international trade system fails to work. In these times it is important that the state aid ban does not become a straitjacket for a successful European industrial policy.

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<sup>184</sup> Communication from the Commission to the European parliament, the European Council, the European Economic and social committee and the Committee of the regions – A New Industrial Strategy for Europe, COM(2020) 102 final, p. 6.

<sup>185</sup> *Ibid.*, p. 16.

<sup>186</sup> *Ibid.*, p. 3.

# 5 EU and public procurement: making better use of the existing toolbox

*Marta Andhov*

## 5.1 Introduction

Public procurement accounts for between 15 and 20% of global gross domestic product (GDP). World Trade Organization (WTO) Governmental Procurement Agreement commitments alone represent around €1.3 trillion in business opportunities worldwide. In the EU, the public purchase of goods and services has been estimated to be worth 16% of GDP. This creates great economic opportunities for private businesses.

It is fair to say that competition within the EU internal market is tough. Not only do EU suppliers compete against each other (a large number of them are small and medium enterprises (SMEs)), but they also face competition from third country suppliers.

Unrestricted competition is in the interests of the EU contracting authorities, which are trying to get the best *deal* for the EU citizens who benefit from public contracts. The challenge faced by EU suppliers is an uneven playing field in relation to third country suppliers, both within the EU market and in third country markets. While nearly 85% of the EU's public procurement market is open to third country suppliers<sup>187</sup>, the US offers only 32% of its market to foreign bidders. Similarly, a small open market can be seen in Japan, where only 28% of the market is open to EU suppliers,<sup>188</sup> and we cannot forget China, which has not signed up to any international trading agreements covering public procurement. Hence, EU suppliers only manage to access a fraction of third country markets. Consequently, at the same time as facing additional competition at home, EU suppliers do not have equal access to procurement markets outside the EU.<sup>189</sup>

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<sup>187</sup> External public procurement initiative – Frequently Asked Questions, MEMO/12/201, [http://europa.eu/rapid/press-release\\_MEMO-12-201\\_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-12-201_en.htm?locale=en)

<sup>188</sup> See Patrick Messerlin, “The beauty of public procurement in TTIP”, *ECIPE Bulletin* 1/2016.

<sup>189</sup> Similar protectionist / preferential regulations are present in Algeria, Australia, Brazil, Canada, Ecuador, Egypt, Indonesia, Kazakhstan, Nigeria, Paraguay, Russia, Tunisia, Turkey, Ukraine and Vietnam. See Commission, “11<sup>th</sup> report on potential trade-restrictive measures identified in the context of the financial and economic crisis” (2014), p. 128.

European companies struggle to compete against global giants. After Brexit, Europe will have only 12 of the world's 100 biggest companies, and it will have none of the top 20 companies. The political tension can be observed, for example, in the rail sector, where the European Competition Authority opposed the merger of Siemens and Alstom.<sup>190</sup> The European Competition Authority argued that the European consumer must be protected from the creation of a potential monopoly. At the same time, Siemens' and Alstom's main competitor, the Chinese company CRRC, is already twice the size of the two companies combined, and just recently won a huge tender for the expansion of the underground system in Stockholm (Sweden).<sup>191</sup> Cecilia Malmström, the EU's chief trade commissioner (at the time), believes the EU needs to be *tougher*, with a more centralised foreign policy and stronger rules to ensure that European companies can compete on fair terms with overseas rivals, whether in the EU market or abroad.<sup>192</sup>

The challenge for EU suppliers manifests itself in the fact that suppliers from third countries, at times, play outside the EU rules, and they are not always bound by the same standards as those that apply to economic operators within the EU. The EU internal market is rooted in market-based principles, which foresee a clear distinction between the *private* and the *public* sector. The boundary between these two sectors becomes increasingly blurred in some third countries, where the state plays a substantial role in nurturing local companies and where it is not clear when and, if so, to what extent foreign states are involved in the financing of companies. Commentators argue that the competition will never be fair as long as private European companies are competing against not private foreign companies but actually foreign states (e.g. China).<sup>193</sup>

Heavy state subsidies paid to public companies (state aid) often give an unfair competitive advantage to these third country suppliers in the EU internal market. Such third country suppliers can submit bids in EU public tenders that are too low, since the suppliers do not operate according to market principles and do not face the same accountability, governance and transparency requirements as, for example, publicly listed EU companies.<sup>194</sup>

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<sup>190</sup> European Commission, Press Release: "Mergers: Commission prohibits Siemens' proposed acquisition of Alstom" Brussels, 6 February 2019.

<sup>191</sup> Lauer, S., "European companies can't compete against global giants", The Guardian, 17 May, 2019, <https://www.theguardian.com/world/2019/may/17/european-companies-cant-compete-against-global-giants>

<sup>192</sup> Brunsden, J., Fleming, S., Beattie, A., "EU ill-equipped to face China and US, Brussels trade chief warns", Financial Times, October 9 2019, <https://www.ft.com/content/d5d1e928-e9c6-11e9-a240-3b065ef5fc55>

<sup>193</sup> Mações, B., "Europe Gets Its Competition With China All Wrong, Foreign Policy", April 3, 2019, <https://foreignpolicy.com/2019/04/03/europe-gets-its-competition-with-china-all-wrong/>

<sup>194</sup> Commission, "EU industrial policy after Siemens–Alstom. Finding a new balance between openness and protection", p. 8. Available at: [https://ec.europa.eu/epsc/publications/other-publications/eu-industrial-policy-after-siemens-alstom\\_en](https://ec.europa.eu/epsc/publications/other-publications/eu-industrial-policy-after-siemens-alstom_en).

Third country bidders, goods and services are not always bound by the same, or equivalent, environmental, social or labour standards as those applicable to EU suppliers. This may put EU bidders, goods and services at a competitive disadvantage. The European Commission (“the Commission”) has identified these challenges in a series of communications:

- 2019 EU industrial policy<sup>195</sup>
- EU industrial policy after Siemens–Alstom; Finding a new balance between openness and protection
- EU–China strategic outlook<sup>196</sup>
- Guidance on the participation of third country bidders and goods in the EU procurement market<sup>197</sup>

In response to these developments, which are believed to create an uneven playing field in the EU internal market, the Commission urges two approaches. First, the already available instruments in EU public procurement law should be applied more extensively to ensure that the same, or equivalent, standards and requirements apply to both EU and third country suppliers. Secondly, the Commission has been arguing since 2012 that, besides the mechanisms that are already available in EU public procurement law, there is a need to take a more proactive approach and introduce a new legal tool – the so-called International Procurement Instrument (IPI) – which is addressed explicitly to bidders from third countries.<sup>198</sup>

The IPI aims to level the playing field with regard to fair competition and access to public procurement markets. It is based on the reciprocity principle. It provides leverage to negotiate with third countries in relation to the opening of their procurement markets for EU businesses. This approach could be criticised on the grounds that, even though the IPI is promoted as a reciprocity tool, it is, in fact, a type of industrial and/or protectionist policy, which may create more barriers to global trade than it removes.

In the following sections of this paper, the author will analyse the EU approach to levelling the playing field in public procurement in response to competition from third country suppliers. To do this, the author will investigate the specific legal framework regarding the access of third country bidders to EU internal market public procurement, and also the general legal framework applicable to

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<sup>195</sup> Commission, brochure, “European Industrial Policy” [https://ec.europa.eu/commission/sites/beta-political/files/brochure\\_industrial\\_policy\\_euco13032019.pdf](https://ec.europa.eu/commission/sites/beta-political/files/brochure_industrial_policy_euco13032019.pdf)

<sup>196</sup> JOIN (2019)5.

<sup>197</sup> Commission, “Guidance on the participation of third country bidders and goods in the EU procurement market” C(2019) 5494 final, Brussels 24.07.2019.

<sup>198</sup> Commission, “Amended proposal for a Regulation of the European Parliament and of the Council on the access of third country goods and services to the Union’s internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries” COM(2016) 34 final.

both third country and EU bidders. First, in Section 5.2, the EU framework on third country bidders will be reviewed. Section 5.3 will analyse the legal instruments currently available that should be mobilised more extensively to ensure that the playing field is level, namely the rules regarding sustainable public procurement (Section 5.3.1) and the provisions on abnormally low tenders (Section 5.3.2). Section 5.4 will focus on the IPI. The paper finishes with a conclusion in Section 5.5.

## 5.2 EU legal framework for the access of third country bidders to the internal market

The EU public procurement regulatory framework is based on the EU Treaty provisions and principles, as well as certain procurement Directives on the public sector,<sup>199</sup> utilities,<sup>200</sup> concessions,<sup>201</sup> and defence,<sup>202</sup> and on remedies in public procurement.<sup>203</sup> The *skeleton* of the rules provided is supplemented by *flesh* in the form of the case law of the Court of Justice of the European Union. Currently, the EU's markets are *de facto* open not only to bidders established in the EU but also to third country bidders, even when the EU does not have access to that third country's market.<sup>204</sup> There are only two specific areas in which EU law explicitly indicates that a Member State or a contracting authority/entity may limit the access to its procurement market for foreign bidders from third countries. These limitations follow from:<sup>205</sup>

- Article 85 of the Utilities Directive, which allows public buyers to reject tenders for supply contracts if more than 50% of the products come from third countries. This applies solely to products originating in third countries that are not covered by a multilateral (e.g. the WTO's Government Procurement Agreement) or bilateral agreement (e.g. the EU–Canada Comprehensive

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<sup>199</sup> Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L94/65.

<sup>200</sup> Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC [2014] OJ L94/243.

<sup>201</sup> Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts [2014] OJ L94/1.

<sup>202</sup> Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works, supply contracts and service contracts by contracting authorities and entities in the field of defence and security, and amending Directives 2004/17/EC and 2004/18/EC [2009] OJ L 216/76.

<sup>203</sup> Remedies Directive 89/665/EEC for the public sector OJ L 395; Directive 2007/66/EC amending Remedies Directives OJ L 335/31.

<sup>204</sup> See F. Hoffmeister, "The EU public procurement regime on third-country bidders – setting the cursor between opened and reciprocity" in H. Kalimo and M.S. Jansson (Eds.), *EU economic law in time of crisis*, (Edward Elgar Publishing 2016).

<sup>205</sup> In practice, reciprocity is assessed in some countries at the point of access to remedies, which indicates that, *de facto*, there are more points at which to control reciprocity. See, for an overview: How to Crack a Nut – a blog on EU economic law – <https://www.howtocrackanut.com/blog/2017/2/22/input-sought-access-to-procurement-remedies-and-reciprocity-in-euea-member-states>.

Economic and Trade Agreement) that ensures comparable and effective access for EU suppliers to the markets of the third country. If the public buyer decides not to reject the tender from the third country bidder, the provision allows for a preference for European tenders and tenders covered by the EU's international obligations, in cases of equivalent offers. In practice, this possibility has only rarely been used.

- Recital 18 of the Defence Directive, which confirms that, because of the often sensitive nature of defence and security requirements, it is up to Member States to define in their own national rules for whether their contracting authorities can accept bids from third countries.

### 5.3 Currently available legal instruments

The current EU public procurement Directives include instruments that may ensure a fair and level playing field inside the EU. A well-designed and well-performed procurement procedure will provide safeguards and *checks* to ensure the playing field for all bidders is fair and level. The instruments mentioned above include broadly understood sustainable public procurement (SPP) provisions, which create a so-called *European standard*<sup>206</sup> under which not only the lowest price but also environmental and social considerations matter, and also abnormally low tender provisions. The two instruments will be analysed below.

#### 5.3.1 Sustainable Public Procurement<sup>207</sup>

Sustainable public procurement (SPP) is a process pursuant to which contracting authorities meet their needs for goods, services, works and utilities in a way that achieves an appropriate balance between the three pillars of sustainable development – the economic (best value for money), social (inclusion and protection) and environmental (minimising damage to the environment) pillars.<sup>208</sup> SPP and the objective of promoting innovation together constitute strategic public procurement.

SPP has been acknowledged as a “strategic” tool not only for achieving the efficient spending of public money and ensuring high standards, but also for assisting governments and their contracting authorities to address societal, environmental and economic challenges.<sup>209</sup> Nowadays, social, environmental

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<sup>206</sup> Commission, “Guidance on the participation of third country bidders and goods in the EU procurement market” C(2019) 5494 final, Brussels 24.07.2019 p. 4.

<sup>207</sup> This section is based on M. Andhov, “Contracting authorities and strategic goals of public procurement – a relationship defined by discretion?” in S. Bogojevic, X. Groussot, and J. Hettne (Eds.), *Discretion in EU procurement law* (Hart Publishing 2019).

<sup>208</sup> UNEPS, “Sustainable public procurement implementation guidelines” (2012), p. 7, available at <https://www.oneplanetnetwork.org/resource/sustainable-public-procurement-implementation-guidelines>.

<sup>209</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, “Making public procurement work in and for Europe”, COM(2017) 572 final.

and innovative considerations may be integrated into all stages of the public procurement process, as long as they are “*linked to the subject matter*” of the contract and the proportionality principle is respected.<sup>210</sup> The environmental and social aspects may be considered as part of:

- the technical specifications (e.g. limitation of hazardous substances, minimum accessibility requirements);
- selection criteria (e.g. exclusion for prior violations being mandatory and/or discretionary);
- award criteria (e.g. most economically advantageous tender, life-cycle costing, use of standards, labels and certifications); and
- contract performance conditions (e.g. specific measures for the disposal of waste).

It is suggested that, to achieve the high-quality objectives of public procurement, provisions in a contract on such matters as life-cycle costing (Article 68 Public Sector Directive), and not solely the purchase price, should be used more extensively.<sup>211</sup>

The Commission has pointed out that, in general, strategic public procurement is not used sufficiently, and that more than 50% of public procurements still operate with the only award criterion being the lowest price. Therefore, the uptake of innovative and sustainable public procurement with high standards in the area of labour, the environment and security is promoted to maximise the impact of the procurement process.

To ensure a level playing field for all participants in the EU single market, the newly introduced Article 18(2) of the Public Sector Directive should be utilised more extensively.<sup>212</sup> The provision is seen as an essential tool with the potential to ensure ethical sourcing, to fight social dumping and to force compliance with environmental laws in the context of public procurement.<sup>213</sup> In other words, Article 18(2) limits the freedom to ignore the strategic objectives in public

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<sup>210</sup> See: Case C-225/98 *Commission v France* EU:C:2000:494 [2000] ECR I-07445; Case C-513/99 *Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne* C:2002:495 [2002] ECR I-07213; Case C-448/01 *EVN AG and Wienstrom GmbH v Republic of Austria* EU:C:2003:651 [2003] ECR I-14527; Case C-368/10 *Commission v Netherlands (Dutch Coffee)* EU:C:2012:284; Case C-115/14 *RegioPost* EU:C:2015:760.

<sup>211</sup> M. Andhov, R. Caranta, and A. Wiesbrock (Eds.), *Cost and EU public procurement law: Life-cycle costing for sustainability* (Routledge Publishing 2020).

<sup>212</sup> Article 18(2) of Directive 2014/24/EU was introduced by the European Parliament during the legislative process with the aim of protecting workers’ rights and ensuring environmental compliance within the execution of public contracts. The introduction of the Article does not seem to have had anything to do with competition from third country bidders, as such.

<sup>213</sup> Article 18(2) could be seen as a continuation – with several important changes – of Article 27 of Directive 2004/18/EC on obligations relating to taxes, environmental protection, employment protection provisions and working conditions.

procurement that concern environmental, social and labour issues. Article 18(2) reads:

Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.

The provision seeks to ensure that public contracts are implemented in compliance with what collectively may be referred to as *sustainability laws* (environmental, social and labour laws at the national, EU and international level). The provision creates a general duty, as it is addressed to the Member States. It must also be read in conjunction with Recital 37, which refers to both Member States and contracting authorities:

With a view to an appropriate integration of environmental, social and labour requirements into public procurement procedures it is of particular importance that Member States and contracting authorities take relevant measures to ensure compliance with obligations in the fields of environmental, social and labour law [...]

Article 18(2) refers solely to *appropriate measures* to be taken in conformity with EU law and principles.<sup>214</sup> The use of the phrases *appropriate* and *reasonably necessary* seems to provide certain limits to the extent of the due diligence that is required from a Member State (and potentially, by extension, that is required from a contracting authority).<sup>215</sup> The application of the proportionality principle will set these limits.<sup>216</sup> The latter principle is to be understood as a balancing test for any task that is required. No task must be disproportionate or excessive in comparison with the desired aim, and all measures must have a natural relationship to the goods or services being procured.

The relevant control should be performed throughout all stages of the procurement procedure: at the selection stage when considering the exclusion of bidders for non-compliance,<sup>217</sup> when applying the general right not to award a contract in case of non-compliance,<sup>218</sup> when obeying the obligation to reject

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<sup>214</sup> See Public Sector Directive, Recital 37.

<sup>215</sup> Due diligence is understood here as the exercise of the care that a reasonable business or person is expected to take before entering into a contract with another party, or an act with a certain standard of care.

<sup>216</sup> Public Sector Directive, Art. 18(1).

<sup>217</sup> Public Sector Directive, Art. 57(4)(a).

<sup>218</sup> Public Sector Directive, Art. 56(1).

an abnormally low tender in case of non-compliance,<sup>219</sup> and when requiring subcontractors' compliance,<sup>220</sup> and at the contract performance stage.

In the context of Article 18(2), the *applicable* obligations in the area of sustainable law should be interpreted broadly as referring not only to the place where the public contract is to be implemented but also to any relevant obligation applicable to a bidder in any place where it operates.<sup>221</sup> If a narrow interpretation was applied, limiting the *applicable* obligation solely to the place where the contract would be implemented, this would give a competitive advantage to bidders from third countries. This would be in breach of the procurement rules, specifically the equality principle, since third country bidders would potentially not be under the same regulatory requirements as EU bidders. The applicable obligations should follow from Article 18(2), which enumerates the sustainability laws and refers to, among other things, Annex X. Annex X secures respect for core ILO (International Labour Organization) conventions on:

- Freedom of Association and the Protection of the Right to Organise
- The Right to Organise and Collective Bargaining
- Forced Labour
- The Abolition of Forced Labour
- Minimum Age
- Discrimination (Employment and Occupation)
- Equal Remuneration
- Worst Forms of Child Labour.<sup>222</sup>

Annex X also refers to environmental law obligations in conventions on the protection of the ozone layer; hazardous waste and its disposal; persistent organic pollutants; and hazardous chemicals and pesticides.<sup>223</sup> Of the “EU laws” mentioned in Article 18(2), Recital 37 of the Public Sector Directive refers explicitly to the Posted Workers Directive 96/71, which concerns working conditions for workers posted in other Member States.<sup>224</sup>

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<sup>219</sup> Public Sector Directive Art 69(3). On issues of abnormally low tenders, see Case C-599/10 *SAG ELV Slovensko and Others*, EU:C:2012:191; Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani*, EU:C:2001:640, [2001] ERC I-09233; Joined Cases C-147/06 and C-148/06 *SECAP and Santorso*, EU:C:2008:277, [2008] ERC I-03565.

<sup>220</sup> Public Sector Directive, Art. 71(1).

<sup>221</sup> A. Semple, “Living wages in public contracts: Impact of the *RegioPost* judgment and the proposed revisions to the Posted Workers Directive” in A. Sánchez-Graells (Ed.), *Smart public procurement and labour standards* (Hart Publishing 2018) p. 83.

<sup>222</sup> In chronological order: ILO Conventions 87, 98, 29, 105, 138, 111, 100, and 182.

<sup>223</sup> See Public Sector Directive, Annex X.

<sup>224</sup> Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ L18/1.

The challenge in assessing compliance with the conventions mentioned above is that they are usually understood in very general terms, making it hard to enforce legal consequences based on them. Extra-territorial enforcement, particularly in a third country, may pose a challenge. Furthermore, the conventions do not help with the issues arising when a contracting authority has to monitor a supplier's compliance with the provisions, and nor do they establish guidelines for remedial action against a non-compliant supplier during the performance of a public contract.

With the wider promotion of strategic and sustainable public procurement there are some connected challenges that should be addressed. First, environmental, social and innovative considerations may, at times, increase the cost of public procurement. If the increased cost is to be borne by the contracting authority, this may help SMEs, which are likely to be less competitive in price.<sup>225</sup> If the increase in procurement costs is to be borne by an SME because of a higher cost of producing the good or service, this will pose a challenge for the SME, especially if the SME is, for example, unable to obtain economies of scale to make the investments in sustainability (e.g. in certification or quality management) that are required to meet the technical specifications. This is a significant concern for SMEs, because an increase in costs will reduce the possibilities of them accessing the procurement, and consequently may lead to a distortion of competition in the internal market. Bearing in mind that SMEs are the dominant life form in the economies of all EU Member States – they amount to 99.8% of all enterprises and contribute more than half of the Union's GDP – this may be a significant challenge.<sup>226</sup> At the same time, some authors point out that the EU and its Member States are increasingly identifying SMEs as vehicles for more sustainable business practices, because of their specialisation, expertise and short management chains.<sup>227</sup> SMEs create considerably more employment opportunities than large companies, and thus contribute to the social dimension of sustainability. Therefore, SMEs can be supported while pursuing SPP.<sup>228</sup>

Secondly, to be able to design and carry out SPP as well as to ensure compliant delivery of the procured contract, a contracting authority must accumulate a certain level of competence and capacity as well as conducting more extensive

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<sup>225</sup> Thanks to Albert Sanchez-Graells for pointing this out to the author when commenting on an earlier draft of this article.

<sup>226</sup> M. Trybus and M. Andrecka, "Favouring small and medium sized enterprises with Directive 2014/24/EU?" in 3/2017 *EPPPL*, p. 224.

<sup>227</sup> S. Schoenmaekers, "The role of SMEs in promoting sustainable procurement" in B. Sjøfjell and A. Wiesbrock (Eds.), *Sustainable public procurement under EU law – New perspectives on the state as stakeholder* (Cambridge University Press 2016).

<sup>228</sup> According to *Financing SMEs and entrepreneurs 2012: An OECD scoreboard* (OECD Publishing: Paris, 2012), at pp. 76, 91, 119 and 153 respectively, 60.5% of the workforce in France, 80% of the workforce in Italy, and 72% of the workforce in Portugal are employed by SMEs. SMEs generate the majority of new jobs created. See: M. Trybus and M. Andrecka, "Favouring small and medium sized enterprises with Directive 2014/24/EU?" in 3/2017 *EPPPL*.

due diligence. Depending on the complexity of the SPP, an adequate level of resources must be invested, in the form of time, human resources or the direct outsourcing of specific tasks. The possibility of designing complex SPP in-house may be limited by a lack of competence in the contracting authority. The need for the professionalisation of public buyers has been expressly pointed out by the Commission.<sup>229</sup>

### 5.3.2 Abnormally low tenders

A tender is deemed abnormally low when the proposed tender price appears to be too low in relation to the goods or services that are being offered. In other words, *the offer is too good to be true*. Identifying, investigating and finally rejecting abnormally low bids is one of the mechanisms that is already available to ensure a level playing field between all bidders. Abnormally low tenders are regulated in Article 69 of the Public Sector Directive:

Contracting authorities shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services.

If a contracting authority suspects the tender is abnormally low, it must ask for an explanation in writing and assess the answer received from the bidder before making its decision.<sup>230</sup> The explanation may relate to the evaluation or verification of: an apparent tender anomaly, such as the economics of the manufacturing process, of the services provided or of the construction method; the technical solutions chosen, or exceptionally favourable conditions available to the tenderer for the supply of the products or services or for the execution of the work; the originality of the work, supplies or services proposed by the bidder; compliance with the environmental, labour and social obligations referred to in Article 18(2); compliance with the subcontracting commitments established in Article 71; or the possibility of the tenderer obtaining state aid.

The list of explanations in Article 69:

is not exhaustive, [but] it is also not purely indicative, and therefore does not leave contracting authorities free to determine which are the relevant factors to be taken into consideration before rejecting a tender which appears to be abnormally low.<sup>231</sup>

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<sup>229</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, “Making public procurement work in and for Europe”, COM(2017) 572 final.

<sup>230</sup> Case C-599/10 *Slovensko* [2011] ECR I-10873 30.

<sup>231</sup> See Case C-292/07 *Commission v Belgium* [2009] I-59 159; and Case C-599/10 *Slovensko* [2011] ECR I-10873 30.

The contracting authority is:

under a duty, first, to identify suspect tenders, secondly to allow the undertakings concerned to demonstrate their genuineness by asking them to provide the details which it considers appropriate, thirdly to assess the merits of the explanations provided by the persons concerned, and, fourthly, to take a decision as to whether to admit or reject those tenders.<sup>232</sup>

A contracting authority may only reject the tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed. The majority of the rejections are discretionary, with one exception. The contracting authority is obliged to reject a tender when the reason for it being abnormally low is that it violates an obligation under the sustainability laws enumerated in Article 18(2).<sup>233</sup> This may occur, for example, if employment protection provisions or the working conditions at the place where the service is to be provided have been violated, or if there has been non-payment of social security contributions.<sup>234</sup>

The mandatory rejection of abnormally low tenders on the basis of non-compliance with Article 18(2) constitutes a very positive step in the fight against social and environmental dumping. In cases in which the rejection of abnormally low tenders is discretionary and a contracting authority intends to accept a bid that is abnormally low, it should inform the other bidders of its intention and explain why it proposes to accept the low bid, to increase the transparency of the procedure.<sup>235</sup> If there is full transparency, any abuse of the system is much less likely.

Contracting authorities cannot exercise unlimited discretion when it comes to the assessment and rejection of abnormally low tenders. Their decisions should comply with the general principles of the EU public procurement Directives and the EU Treaties (equal treatment, non-discrimination, transparency, proportionality and competition). It is crucial to point out that the treatment of abnormally low tenders by contracting authorities might cause distortion in competition and have a negative impact on innovation.<sup>236</sup> Consequently, it is essential that the contracting authority analyses, for each case, the reason for

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<sup>232</sup> Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233 55.

<sup>233</sup> Public Sector Directive Art. 69(4).

<sup>234</sup> É van den Abeele, "Integrating social and environmental dimensions in public procurement: One small step for the internal market, one giant leap for the EU?", *ETUI Working Paper 2014.08*, 19.

<sup>235</sup> Commission, "Press release: External public procurement initiative – frequently asked questions" MEMO/12/201, Brussels, 21 March 2012 available at [https://europa.eu/rapid/press-release\\_MEMO-12-201\\_en.htm?locale=en](https://europa.eu/rapid/press-release_MEMO-12-201_en.htm?locale=en).

<sup>236</sup> See A. Sánchez-Graells, "Abnormally low tenders under Reg. 69 Public Contracts Regulations 2015" available at <https://www.howtocrackanut.com/blog/2015/06/abnormally-low-tenders-under-reg-69.html?rq=abnormally%20low%20tender>.

an abnormally low tender, to ensure that the tender is not rejected when there are valid reasons for it being low, such as the development of a new cost-cutting production methodology, or of innovative solutions or techniques.

As part of any good public procurement process, a contracting authority should conduct preliminary market research and calculate the expected cost of the contract. Therefore, urging contracting authorities to use the provisions on abnormally low tenders to ensure a level playing field should not in any way increase the number of tasks they have to perform. As to ensuring the efficient spending of taxpayers' money, the assessment of abnormally low tenders should be carried out on each occasion on which there seems to be a risk of a violation. At the same time, the contracting authority is limited in its discretion, since the principle of proportionality limits what it can ask from the bidder regarding proof.

#### 5.4 International Procurement Instrument (IPI)

The Commission has been concerned for some time that the playing field is not fair and that many other countries have implemented so-called *buy local* rules, which close off their own domestic public procurement markets from EU bidders.<sup>237</sup> In 2012, these concerns led the Commission to propose a draft reciprocity regulation called the International Procurement Instrument, which covered the procurement of goods and services from countries with whom the EU had no international commitments for market access.<sup>238</sup> The 2012 proposal suggested a two-pronged decentralised and centralised approach to solving the issue.

The decentralised approach would allow contracting authorities to reject bids that consist of more than 50% of non-EU-based goods or services (except where the bidder is from a country with which the EU has an existing international procurement agreement). The right to exclude would not be automatic. Contracting authorities would need to notify the Commission about their intent, and the Commission would have two months to assess the existence of reciprocity with the third country in question and to decide whether or not to approve such an exclusion.<sup>239</sup>

The centralised approach would be used in the event of repeated and severe discrimination against EU suppliers in other countries. The Commission would have the power to conduct investigations into possible discriminatory procurement practices in third countries in which public procurement markets

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<sup>237</sup> See: M. Meulenbelt, "Protectionism on the rise? Modernization of EU public procurement rules during the economic crisis" in H. Kalimo and M.S. Jansson (Eds.), *EU economic law in time of crisis*, (Edward Elgar Publishing 2016).

<sup>238</sup> Commission, "Proposal for a Regulation of the European Parliament and of the Council on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries" COM(2012) 124 final.

<sup>239</sup> A. Maughan, "Non-EU bids on EU public contracts" available at <http://govcon.mofo.com/international-public-procurement/non-eu-bids-on-eu-public-contracts/>.

were not open to EU suppliers, and to start consultations with the countries concerned to try to resolve those market access problems. If necessary, the Commission could take additional measures to restrict bidders from those offending third countries from having access to the EU's public procurement market. Those restrictive measures could include the exclusion of tenders originating from a particular country in a particular sector or the imposition of a price penalty on such non-EU bids.<sup>240</sup>

The 2012 proposal, although it was supported by the European Parliament, was unsuccessful. There was no consensus among the Member States. While France has for a long time been a supporter of reciprocity in the opening of markets, an alliance of free-trading northern countries and southern Member States that have nurtured close investment ties with some of the third countries in question has argued that such a regulation would simply push up the costs for local authorities and therefore taxpayers.<sup>241</sup> Notably, the proposed decentralised approach ended up being the most controversial, with concerns being raised about the administrative burdens that would be imposed by the proposal.

In 2016, a second draft of the IPI was proposed, with simplified procedures, shortened timelines and reduced administrative processes.<sup>242</sup> The decentralised approach was dropped, and the 2016 proposal did not permit a contracting authority to ban non-EU bids altogether. The focus instead was on price penalties or price adjustment measures. If, following a Commission investigation, it was determined that a third country was applying barriers to the participation of EU suppliers in its public procurement market, a price penalty could be applied of up to 20% of the actual price. The penalty would apply only to bids from the targeted third country for a total value of at least €5 million of which at least 50% consisted of goods and services coming from the targeted third country. A non-EU bidder could be subject to a price adjustment measure for evaluation purposes but could still be awarded the contract if, despite the price adjustment, the offer remained competitive in terms of price and quality.

Even this “watered down” proposal ended up in deadlock, as a strong majority of Member States remain unconvinced about the benefits of the plan, and criticised the proposal for prospectively only limiting the options for EU Member States and restricting ventures with foreign partners rather than opening other public

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<sup>240</sup> Ibid.

<sup>241</sup> B. Hall, “Europe’s new front in competition clash with China”, available at <https://www.ft.com/content/be81c866-5aaf-11e9-9dde-7aedca0a081a>.

<sup>242</sup> Commission, “Amended proposal for a Regulation of the European Parliament and of the Council on the access of third-country goods and services to the Union’s internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries” COM(2016) 34 final, Brussels 29.1.2016.

procurement markets.<sup>243</sup> A third draft of the proposal is currently contemplated, with possible additions to the original text which could cover, for example, environmental and labour criteria for bidders coming from targeted third countries, instead of a price penalty.<sup>244</sup>

## 5.5 Conclusion

In July 2019, as a response to the increasing competition from third country suppliers that was believed to create an uneven playing field in the EU internal market, the Commission issued guidance on the participation of third country bidders in the EU procurement market. This is the first deliverable of the ten actions set out in the Communication on EU–China relations that was supported by the European Council in its March 2019 conclusions. The guidance clarifies that only companies from third countries with which the EU has signed binding international or bilateral free trade agreements covering public procurement have guaranteed access to the EU procurement market. Other third country companies do not have secured access to EU procurement markets and may be excluded. The discretion in making such a decision is left to the Member States and their contracting authorities. This option is rarely executed in practice.

To ensure a fair and level playing field, the Commission urges two approaches. First, it suggests the more extensive application of the instruments that are already available in EU public procurement law to ensure that the same, or equivalent, standards and requirements apply to both EU and third country suppliers. Second, the Commission encourages the introduction of the reciprocity regulation (the IPI). This is the only instrument introduced as a direct response to the increased competition from third country bidders in public procurement. Other measures discussed in this analysis have been introduced to achieve good procurement in general.

Since 2012, attempts to introduce the IPI have been unsuccessful, as the IPI has been seen as a mechanism that works against what EU procurement stands for, namely the liberalisation of public procurement markets. If the IPI is introduced, the rules applied to businesses established within the EU will be *different* from those applied to businesses from third states.

Until now, many Member States have seen the risk of the IPI achieving the opposite result to what is expected, in the form of retaliation from trading partners and the further closing of the procurement markets. This could have the potential of limiting competition in the internal market and restricting the contracting authorities from achieving the best *deal* to satisfy their needs. The

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<sup>243</sup> J. Hanke and J. Barigazzi, “EU accelerates moves to block China’s market access” available at <https://www.politico.eu/article/eu-accelerates-moves-to-block-chinas-market-access/>.

<sup>244</sup> J. Valero, “EU’s procurement reform faces uphill struggle” available at: <https://www.euractiv.com/section/economy-jobs/news/eus-procurement-reform-faces-uphill-struggle/>.

IPI *path*, for now, continues to be unsuccessful. However, commentators note that the political winds are changing and that there might be a third attempt to get the IPI into the EU legal framework, particularly with the recent support of the initiative by Germany.

There is an argument to be made that, even without the introduction of a new instrument such as the IPI, the EU public procurement Directives overall offer contracting authorities ample flexibility to tailor their procurements specifically to their needs; this is the thrust of the guidelines published by the Commission in the EU–China package. A well-designed public procurement process, with good governance, can ensure a fair and level playing field between all the bidders. The Commission underlines the fact that, specifically, a broader applicability of the strategic approach to public procurement, with the promotion of sustainable public procurement, together with the utilisation of the provisions on abnormally low tenders, is crucial.

The challenge exists because a more extensive and in-depth application of SPP and the abnormally low tender rules may require more comprehensive due diligence on the part of contracting authorities. These authorities often do not have the resources or competences to carry out due diligence, and additional investment may be required from all suppliers. Additional costs may lead to smaller numbers participating in tenders – particularly fewer SMEs – which, in turn, may lead to a distortion of competition; this is not in the contracting authorities’ interest.

To conclude, it seems that in the area of public procurement “*business should be as usual*”. We do not have more stringent rules for procurement as a consequence of competition from third party countries. The rules are established to ensure the liberalisation of trade, efficiency and the good governance of public contracts. Currently, the existing public procurement rules provide a legal framework that allows proactive contracting authorities to ensure compliance and a level playing field in the internal market. Attention should be drawn to the fact that, as due diligence tasks are growing and becoming more complex, we need further professionalisation of the contracting authorities so that they can design and carry out SPP as well as abnormally low tender investigations. The change that is required to ensure a level playing field between EU and third country suppliers is in the appropriate and proactive application of the existing and available solutions, before the introduction of a trade defence instrument such as the IPI, even if the Member States would accept such an instrument. In other words, the legal framework providing options is in place, but the willingness, skillset and capacity of the public sector must be improved.

# 6 Harmonisation of company law at EU level as an effective and complementary instrument for screening foreign direct investments

*Thomas Papadopoulos*

## 6.1 Introduction

The European Union (EU) is one of the world's most open places to invest. EU investment policy aims at attracting international investments into the EU, while protecting the EU's essential interests and securing a level playing field. It also aims at preserving the right for home and host countries to regulate their economies in the public interest. Furthermore, EU investment policy intends to facilitate investments by creating a predictable and transparent business environment and promote investments that support sustainable development, respect for human rights and high labour and environmental standards.

It is clear from the Treaty provisions that the EU handles foreign direct investment policies on behalf of the Member States.<sup>245</sup> All investors in the EU must comply with EU and national laws, including the EU competition rules, irrespective of nationality. A proposed investment falling within the scope of the EU Merger Regulation<sup>246</sup> cannot go ahead without prior review and approval by the European Commission (the Commission). Other relevant rules may also

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<sup>245</sup> Articles 63, 206 and 207 of the Treaty on the Functioning of the European Union (TFEU).

Questions related to investment are EU-exclusive competence through the Lisbon Treaty.

However, portfolio investments covering transactions in equity and debt securities are still for the Member States to regulate.

<sup>246</sup> Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L24/1.

be found in EU legislation addressing security but merely in relation to specific critical infrastructures and essential services.<sup>247</sup>

The Commission has, in its analysis<sup>248</sup> on foreign direct investments, concluded that there has been a continuous rise of foreign ownership in the EU over the last ten years, mostly due to acquisitions of increasingly large, listed companies.<sup>249</sup> Traditionally, the main investors in the EU are the United States (US), Switzerland, Norway, Canada, Australia and Japan, but new investors have emerged from a diversity of countries, where China stands out in terms of the number of recent acquisitions. The role played by so-called “offshore investors” represents a striking controlling 11 percent of foreign-owned EU companies<sup>250</sup> and a significant share of foreign-owned assets in the EU. Foreign ownership is high in several sectors that are at the heart of the economy, such as oil refining, pharmaceuticals, electronic and optical products, insurance or electrical equipment. State-owned companies represent a small proportion of foreign acquisitions; however, their share in the number of acquisitions and their assets have grown rapidly over the latest years. Russia, China and the United Arab Emirates stand out in this respect. One may also notice that foreign investment funds and private equity firms account for an increasing number of acquisitions, dominated by the US, followed by the Cayman Islands and

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<sup>247</sup> Several assets have been identified as critical at the European level: Galileo, Copernicus, Eurocontrol, the European electricity and gas transmission networks. Specific attention must be given to the security, integrity and ownership of these infrastructures and the need to ensure their continuous operation. Some EU legislation directly addresses the impact of foreign ownership (e.g. impacts related to air carriers, gas or electricity transmission systems and prospecting). It is interesting to mention the possibility of control of strategic infrastructures in the energy sector by non-EU entities, notably, state-owned enterprises, national banks or sovereign funds from key supplier countries that aim at penetrating the EU market and the risk that they hamper diversification of supplies and the development of the EU network and infrastructure. See the “Communication from the Commission to the European Parliament, the European Council, the European Economic and Social Committee and the Committee of the Regions, Welcoming Foreign Direct Investment while Protecting Essential Interests” COM (2017) 494, final.

<sup>248</sup> Commission Staff Working Document on Foreign Direct investment in the EU, Following up on the Commission Communication, “Welcoming Foreign Direct Investment while Protecting Essential Interests” of 13 September 2017, SWD (2019) 108, final.

<sup>249</sup> In its “Communication from the Commission to the European Parliament, the European Council, the European Economic and Social Committee and the Committee of the Regions, Welcoming Foreign Direct Investment while Protecting Essential Interests” COM (2017) 494, final, the Commission concludes that foreign direct investments are an important source of growth, jobs and innovation, which benefits the EU and the rest of the world. Still, there are increasing concerns about strategic acquisitions of European companies with key technologies by foreign investors, especially state-owned enterprises. On the basis of this communication, the Commission committed to carrying out a detailed analysis of foreign direct investments in the EU.

<sup>250</sup> With the term “EU company”, this paper refers to a national company established in a Member State under its domestic law. An “EU company” falls within the scope of Article 54 TFEU and could benefit from freedom of establishment. The term “EU company” was chosen to distinguish such companies from “non-EU companies”, which are companies established in a non-EU State.

Switzerland. There is also a rise in individuals as ultimate owners in an increasing number of acquisitions, which are mainly Swiss, US, Russian, Norwegian and Chinese passports.

Against this backdrop, the EU, in March 2019, adopted a Regulation setting up a framework for the screening of foreign direct investments that may affect security or public order. That Regulation establishes a framework for the screening by Member States of foreign direct investments into the EU on the grounds of security or public order. It establishes a framework with a mechanism for cooperation and exchange of information between Member States, and between Member States and the Commission, with regard to foreign direct investments likely to affect security or public order. It includes the possibility for the Commission and other Member States to issue opinions on such investments. Nevertheless, the Regulation does not require the Member States to maintain their existing screening mechanisms, to adopt new ones or to introduce such national mechanisms. Therefore, a question remains whether there is a need for additional or more stringent instruments to screen foreign direct investments.

However, instruments for screening foreign direct investments may be found in the EU harmonisation of company law offering mechanisms, which could also be used for this purpose. Those company law instruments could be used indirectly for this screening, as their primary aim is to promote the EU fundamental freedom of establishment of companies (arts 49–54 TFEU). Although their primary objective is “the protection of the interests of members [i.e. shareholders] and others” (art 50(2)(g) TFEU), in parallel with this primary objective, they could also contribute significantly to an effective screening of foreign direct investments. Quite often, many companies and their stakeholders are using these harmonised company law instruments to screen who is hiding behind foreign direct investments in the capital of such companies.

The harmonisation of European company law could play an effective, but complementary role, in the screening of foreign direct investments. The identity and intentions of a foreign investor acquiring corporate control or even a portfolio investment might have important repercussions on corporate relationships and management within and outside the company. Such harmonised company law instruments could identify and evaluate such identity and intentions. On the one hand, in Member States without a special and sophisticated system of screening foreign direct investments, those harmonised company law instruments that Member States must implement on a mandatory basis may provide the possibility of screening foreign direct investments in the capital of EU companies. On the other hand, in Member States with a special and sophisticated system of screening foreign direct investments, those harmonised company law instruments could operate complementary to the screening system and enhance it by providing additional information. Although the harmonised company law instruments are addressed to EU companies and their stakeholders

(i.e. directors, shareholders, creditors, employees), sometimes they give powers to national supervisory authorities of Member States, which could block certain corporate procedures and actions.

First, this paper discusses how the Takeover Bids Directive could contribute to an effective screening of foreign direct investments. Furthermore, this paper refers to political considerations and protectionism in takeover bids, as well as their impact on screening foreign direct investments. Additionally, this paper examines how the Shareholders Rights Directive II and the Transparency Directive could contribute to investment screening. Furthermore, screening may take place through some corporate restructuring harmonising instruments. More specifically, there is a possibility to block the process of a cross-border merger or of the establishment of a “Societas Europaea” (SE) by merger or of the transfer of the registered office of an SE threatening public interest. All of the harmonising company law instruments could be used indirectly and complementary to the screening, as their primary aim is the promotion of the EU fundamental freedom of establishment of companies (Article 49–54 TFEU).

## **6.2 Takeover Bids Directive and screening of foreign direct investments**

A takeover bid is a corporate control transaction between a third party (i.e. the acquirer) and the company’s shareholders.<sup>251</sup> A “takeover bid” is a method often used to carry out a takeover or merger, and it takes the form of an offer to buy all the shares of the company.<sup>252</sup> What happens is that one company (i.e. the offeror, bidder or acquiring company) buys either all or at least a voting majority of the shares in another (i.e. the offeree or target company).<sup>253</sup> After the takeover, the two companies remain in being, and the offeree company becomes a subsidiary (perhaps a wholly-owned subsidiary) of the other, and it is thereafter controlled by the acquiring company through its majority shareholding and its ability to remove the existing directors and appoint its own nominees in their place.<sup>254</sup> A takeover bid is a quite common method of acquiring control of an EU company: the third-country investor sets up an EU company (i.e. offeror company or bidder), which launches a takeover bid towards another EU company (i.e. offeree company or target company) to acquire its corporate control. Since 2004, takeover bids at the EU level are harmonised by the Takeover Bids Directive

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<sup>251</sup> Reinier Kraakman and others, *The Anatomy of Corporate Law* (3rd edn, OUP 2017) 205.

<sup>252</sup> MA Weinberg, MV Blank, AL Greystoke, *Takeovers and Mergers* (4th edn, Sweet & Maxwell 1979) 3.

<sup>253</sup> LS Sealy, “The Draft Thirteenth Directive on Take-overs” in Stephen Kenyon-Slade and Mads Andenas (eds), *EC Financial Market Regulation and Company Law* (Sweet & Maxwell 1993) 135.

<sup>254</sup> *Ibid* 135.

(Directive 2004/25/EC).<sup>255</sup> It is interesting to examine, in the context of the Takeover Bids Directive, how a target company could screen a foreign direct investment occurring through a takeover bid. In this context, the possibility of a target company, after the screening, to reject a hostile bid and, simultaneously, an unwelcome foreign direct investment is also discussed. During the process of a takeover bid, it is up to EU companies to screen and not the Member States. In the context of listed companies, the Takeover Bids Directive could be used for screening foreign direct investments. The two main provisions of the Takeover Bids Directive are:

1. *the board neutrality rule*, which does not allow the board of the target company to adopt defensive measures (i.e. those measures adopted by the target company's board aiming at the frustration of a bid) during the period allowed for the acceptance of the bid (art 9);<sup>256</sup> and
2. *the breakthrough rule*, under which any restrictions on the transfer of securities or on voting rights shall not apply vis-à-vis the offeror during the time allowed for acceptance of the bid or shall not have effect at the general meeting of shareholders which decides on any defensive measures (art 11).

However, these two main provisions of the Takeover Bids Directive are optional. Article 12 of the Takeover Bids Directive introduces a complicated multi-level *optionality* and *reciprocity* system. According to the *optionality system*, Member States may reserve the right not to require companies to apply the board neutrality rule or the breakthrough rule. Where a Member State makes use of optionality and opts out, the board neutrality or the breakthrough rule do not apply to the companies of the specific Member State. Nevertheless, the opting-out Member State shall grant its companies the option, which shall be reversible, of applying voluntarily the board neutrality rule or the breakthrough rule. According to the *reciprocity system*, Member States may, under the conditions determined by national law, exempt companies that apply the board neutrality rule or the breakthrough rule, if they become the subject of an offer launched by a company that does not apply the same articles as they do, or by a company controlled, directly or indirectly, by the latter.<sup>257</sup>

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<sup>255</sup> Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L24/1; Council Directive 2004/25/EC of 21 April 2004 on takeover bids [2004] OJ L142/12 (Takeover Bids Directive). For an analysis of the Takeover Bids Directive, see also Thomas Papadopoulos, *EU Law and the Harmonization of Takeovers in the Internal Market* (Kluwer 2010); Thomas Papadopoulos, "The European Union Directive on Takeover Bids: Directive 2004/25/EC" (2008) 6 *Int'l Comp Corp LJ* 13.

<sup>256</sup> For a critique on the board neutrality rule, see Paul L Davies, Edmund-Philipp Schuster, Emilie van de Walle de Ghelcke, "The Takeover Directive as a Protectionist Tool?" in Ulf Bernitz and Wolf-Georg Ringe (eds.), *Company Law and Economic Protectionism: New Challenges to European Integration* (OUP 2010), 107–25.

<sup>257</sup> For an analysis of the choices made by Member States and by companies in the implementation of board neutrality rule, see *ibid* 125–52.

The adoption of both the optionality and reciprocity systems by Member States gives their listed companies the possibility to frustrate hostile takeovers by bidders of unwanted foreign investors. On the one hand, in a Member State applying the optionality regime, a target company could allow its board of directors to adopt various defensive measures<sup>258</sup> that are capable of frustrating a bid launched by a hostile company controlled by a foreign investor. Optionality could also permit the introduction of restrictions on the transfer of securities or on voting rights capable of permanently inhibiting the takeover by a hostile bidder controlled by a foreign investor.<sup>259</sup> On the other hand, in a Member State applying the reciprocity regime, a target company could retaliate and could allow defensive measures and restrictions on the transfer of securities or on voting rights against a company, which does not open itself to takeovers by adopting defensive measures.

Although the board neutrality rule does not allow the board to adopt independent defensive measures, it does not require the board to remain completely inactive during the period allowed to acceptance the bid.<sup>260</sup> According to Article 9(2) of the Takeover Bids Directive, the board complying with the board neutrality rule could seek for alternative or competing bids without the prior authorisation of shareholders.<sup>261</sup> The board could try to enlarge the available offers to shareholders by seeking for a “white knight”.<sup>262</sup> A “white knight” is a welcomed and friendly competing bidder, compared to a unwelcomed and hostile bidder. It is quite obvious that the board performs a screening of the first bidder before deciding to

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<sup>258</sup> The board of the target company can choose from a great variety of defensive measures. The “poison pill” is a mechanism implemented by a company that could become the target of an unwelcomed takeover bid. This mechanism makes sure that a successful takeover bid will trigger some frustrating event that substantially reduces the value of the company. John G Pallister and Alan Isaacs, *Oxford Dictionary of Business* (3rd edn, OUP 2002) 392. Other defensive measures adopted by the board of the target company, which could frustrate a hostile takeover bid, are: “the sale of crown jewels” or “spin-offs” (i.e. selling valuable assets of the company), “lock-up options” (i.e. granting preferential options over shares or assets to white knights or other persons), “green mail” (i.e. paying the hostile bidder to withdraw its bid), the “Pac Man” defense (i.e. launching a bid for the bidder itself) and “golden parachutes” (i.e. contractually binding the target company to make large severance payments to incumbent managers in the event of a change of control). Alan Dashwood and others, *Wyatt and Dashwood’s European Union Law* (Hart 2011) 881; Christian Kirchner, Richard W Painter, “Takeover Defences under Delaware Law, the proposed Thirteenth EU Directive and the New German Takeover Law: Comparison and Recommendations for reform” (2002) 50 *Am J Comp L* 451, 452; cf Pallister and Isaacs, *op cit*, 393.

<sup>259</sup> This is the distinction between *ex ante* and *ex post* defensive measures. *Ex ante* defensive measures exist in the target company’s articles of association or in agreements between shareholders before the launch of the takeover bid, while *ex post* defensive measures are adopted by the board after the launch of the takeover bid. Nicola de Luca, *European Company Law* (CUP 2017) 415.

<sup>260</sup> Kraakman and others, *op cit*, 213.

<sup>261</sup> For a critical approach to the benefits of competing bids, see Federico M Mucciarelli, “White Knights and Black Knights – Does the Search for Competitive Bids Always Benefit the Shareholders of ‘Target’ Companies?” (2006) 3 *ECFR* 408.

<sup>262</sup> The alternative or competing bids are considered to have a wealth-enhancing impact on the target company’s shareholders. Kraakman and others, *op cit*, 214.

look for a competing bidder. After a careful screening of the first bidder, the board could decide that the bidder is an unwelcomed one and could start looking for friendlier bidders. If the results of the screening of the first bidder reveal that this bidder has plans against the interests of the target company, the target company's board could contact a potential friendly bidder (i.e. white knight) and invite it to submit a competing bid. The search for a friendly competing bidder also entails a careful screening of potential competing bidders to identify its friendly stance towards the target company.

While the board cannot adopt defensive measures, due to the board neutrality rule, it could seek to influence the view of shareholders and persuade them to take a specific decision. Recital 17 of the Takeover Bid Directive's Preamble states:

The board of an offeree company should be required to make public a document setting out its opinion of the bid and the reasons on which that opinion is based, including its views on the effects of implementation on all the company's interests, and specifically on employment.

Article 3(1)(b) of the Takeover Bids Directive introduces a general principle on the expression of the board's opinion on the takeover bid, which assists shareholders in deciding on the bid:

[T]he holders of the securities of an offeree company must have sufficient time and information to enable them to reach a properly informed decision on the bid; where it advises the holders of securities, the board of the offeree company must give its views on the effects of implementation of the bid on employment, conditions of employment and the locations of the company's places of business.

According to Article 9(5) of the Takeover Bids Directive, the board expresses its non-binding, consultative opinion on the bid and circulates it among shareholders, with the aim of affecting their views and choices in a particular way.<sup>263</sup> Similarly with the efforts to find competing bids, the board is not characterised by complete passivity, as it could issue its opinion on the advantages and disadvantages of the bid, which proposes to shareholders the route they should follow. This possibility of the board to express its opinion on the bid deals with the information asymmetry problems of target company's shareholders.<sup>264</sup> The opinion of the board might be exposed to conflicts of interests in case the board would be replaced after a successful bid. Such conflicts of interest could be mitigated, if independent experts participate in the preparation of the document

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<sup>263</sup> Ibid 213.

<sup>264</sup> Ibid 213.

expressing the board's opinion on the bid.<sup>265</sup> That opinion of the board also includes elements of screening foreign direct investments launched through a takeover bid. Screening of a foreign direct investment behind a bid is an indispensable part for the preparation of this document. The board evaluates the foreign investor behind the bid and states its findings from this screening process in its opinion. Considering the frequently negative stance of the board against foreign bids, the opinion of the board might constitute a source of protectionism against bidders controlled by a foreign investor.

### **6.3 Disclosure of information in takeover bids and screening of foreign direct investments**

Disclosure of information in the context of a takeover bid is essential for the screening of a foreign investor launching a takeover bid through an EU company. An offer document should provide detailed information on the bidder, the conditions of its offer and its strategic plans and intentions for the target company. Recital 13 of the Takeover Bid Directive's Preamble states: "The holders of securities should be properly informed of the terms of a bid by means of an offer document [...]". Article 3(1)(b) of the Takeover Bids Directive introduces a general principle on the conditions under which shareholders decide on the bid: "the holders of the securities of an offeree company must have sufficient time and information to enable them to reach a properly informed decision on the bid".

Hence, the provision of sufficient information is a prerequisite for a "properly informed decision on the bid" and contributes to the screening of a foreign direct investment constituting the basis of a takeover bid. This requirement for sufficient information permits shareholders to screen the status of the foreign investor, the conditions of its offer and its strategic plans on the target company before reaching their decision on whether to accept the bid.

The Takeover Bids Directive has certain provisions obliging the bidder to disclose its plans and intentions regarding the target company. Article 6 of the Takeover Bids Directive is dedicated to important information concerning bids. This is a disclosure obligation for the pre-offer announcement, as well as during and after the offer announcement.<sup>266</sup> More specifically, Article 6(2) of the Takeover Bids Directive requires the bidder to disclose certain information concerning

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<sup>265</sup> Konstantinos Sergakis, *The Law of Capital Markets in the EU: Disclosure and Enforcement* (Palgrave 2018) 138.

<sup>266</sup> *Ibid* 132–39.

its bid through the publication of a detailed offer document.<sup>267</sup> Article 6(3) of the Takeover Bids Directive prescribes the minimum content of the offer document.<sup>268</sup>

The offer document delves into the identity and the background of the bidder and could also disclose certain information of a foreign investor, who is controlling the bidder. The offer document not only requires information on the bidder but also asks for the disclosure of information on the characteristics and conditions of the bid, which could reveal the stance of the bidder towards the target company. Such required information could be used as a screening mechanism for foreign investors controlling the bidder. Apart from the identity of the bidder, the offer document should disclose the following:

- existing holdings of the bidder and of persons acting in concert with him;
- the identity of persons acting in concert with him;
- conditions applying to a bid;

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<sup>267</sup> Art 6(2) of the Takeover Bids Directive states:

Member States shall ensure that an offeror is required to draw up and make public in good time an offer document containing the information necessary to enable the holders of the offeree company's securities to reach a properly informed decision on the bid. Before the offer document is made public, the offeror shall communicate it to the supervisory authority. When it is made public, the boards of the offeree company and of the offeror shall communicate it to the representatives of their respective employees or, where there are no such representatives, to the employees themselves.

Where the offer document referred to in the first subparagraph is subject to the prior approval of the supervisory authority and has been approved, it shall be recognised, subject to any translation required, in any other Member State on the market of which the offeree company's securities are admitted to trading, without its being necessary to obtain the approval of the supervisory authorities of that Member State. Those authorities may require the inclusion of additional information in the offer document only if such information is specific to the market of a Member State or Member States on which the offeree company's securities are admitted to trading and relates to the formalities to be complied with to accept the bid and to receive the consideration due at the close of the bid as well as to the tax arrangements to which the consideration offered to the holders of the securities will be subject.

<sup>268</sup> Art 6(3) of the Takeover Bids Directive states:

[t]he offer document referred to in paragraph 2 shall state at least: (a) the terms of the bid; (b) the identity of the offeror and, where the offeror is a company, the type, name and registered office of that company; ... (f) the maximum and minimum percentages or quantities of securities which the offeror undertakes to acquire; (g) details of any existing holdings of the offeror, and of persons acting in concert with him/her, in the offeree company; ... (h) all the conditions to which the bid is subject; (i) the offeror's intentions with regard to the future business of the offeree company and, in so far as it is affected by the bid, the offeror company and with regard to the safeguarding of the jobs of their employees and management, including any material change in the conditions of employment, and in particular the offeror's strategic plans for the two companies and the likely repercussions on employment and the locations of the companies' places of business; ... (k) where the consideration offered by the offeror includes securities of any kind, information concerning those securities; (l) information concerning the financing for the bid; (m) the identity of persons acting in concert with the offeror or with the offeree company and, in the case of companies, their types, names, registered offices and relationships with the offeror and, where possible, with the offeree company; (n) the national law which will govern contracts concluded between the offeror and the holders of the offeree company's securities as a result of the bid and the competent courts.

- bidder's intentions and strategic plans for the future business of the target company;
- impacts on employment conditions;
- information about securities offered as consideration; and
- information concerning the financing of the bid.<sup>269</sup>

The latter issue, regarding the financing of the bid, is quite important because, quite often, the necessary capital for the takeover bid would be injected under the free movement of capital provisions from the foreign investor into its eventual EU subsidiary company launching the bid. The financial position of the bidder should be disclosed as the bid should not be self-funded but based on external funding deriving from a foreign investor.

Nevertheless, many bidders do not go into much detail and depth when they provide information concerning bids because they want to be adjusted to the new realities and conditions following a bid and to avoid being firmly bound about future actions, which might not be realisable or might be negative for the bidder.<sup>270</sup> The lack of in-depth information might diminish the possibility of screening a foreign direct investment behind a takeover bid. In a future revision, the scope and content of required information available to the target company and to supervisory authorities could be extended significantly and further developed, which could enhance both transparency in capital markets, as well as screening of foreign direct investments.

#### **6.4 Political considerations and protectionism in takeover bids and their impact on the screening of foreign direct investments**

Apart from the legal provisions regulating takeover bids, political considerations play a very important role. Many Member States do not want a transfer of control of their strategic companies to foreign investors.<sup>271</sup> The political cost is quite high for governments of Member States, where successful takeovers resulted in a control shift of strategic companies to foreign investors. The public worries about the repercussions of takeover bids on the national economy and is afraid of collective redundancies following the completion of a takeover bid.<sup>272</sup> The Takeover Bids Directive provides the ground for protectionism, under which screening of an unwelcome foreign investor behind a takeover bid could lead to the rejection of its bid. Hence, political considerations appear in the EU market for corporate control and could affect the implementation of the Takeover Bids Directive. Member States implemented the Takeover Bids Directive in a

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<sup>269</sup> Sergakis, op cit, 136.

<sup>270</sup> Ibid 136; David Kersaw, *Principles of Takeover Regulation* (OUP 2016) 278.

<sup>271</sup> Kraakman and others, op cit, 239.

<sup>272</sup> Ibid 240.

protectionist way.<sup>273</sup> With regard to the transposition of the optional provisions of the Takeover Bids Directive, 19 Member States implemented the board neutrality rule, 3 Member States implemented the breakthrough rule and 13 Member States permit their companies, which apply the board neutrality rule or breakthrough rule (by legislation or based on the company's articles of association), not to apply the rule when they are the target of a takeover bid by a bidder which does not apply the same rule (reciprocity).<sup>274</sup>

The 2007 Report on the implementation of the Takeover Bids Directive comments on the protectionist approach of Member States:

However, there is a risk that the board neutrality rule, as implemented in Member States will hold back the emergence of a European market for corporate control, rather than facilitate it. It is unlikely that the breakthrough rule, as implemented in Member States would bring any significant benefits in the short term. A large number of Member States have shown strong reluctance to lift takeover barriers. The new board neutrality regime may even result in the emergence of new obstacles on the market of corporate control. The number of Member States implementing the Directive in a seemingly protectionist way is unexpectedly large.<sup>275</sup>

There are examples of takeovers of “national champions” attracting political controversy and reactions of the public, such as the Cadbury/Kraft Takeover and the Alstom/General Electric acquisition.<sup>276</sup>

Additionally, national supervisory authorities could waive national takeover rules in accordance with derogations prescribed by their national law and circumstances determined at the national level (art 4(5)(i)–(ii) of the Takeover Bids Directive). Member States enjoy discretion with regard to the derogations of takeover rules adopted in their national laws. The power of the supervisory authority to waive takeover rules, according to specific national derogations,

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<sup>273</sup> Klaus J Hopt, “Obstacles to corporate restructuring: Observations from a European and German perspective” in Michel Tison and others (eds), *Perspectives in Company Law and Financial Regulation* (CUP 2009) 375; Kraakman and others, op cit, 239. It is extremely difficult for the Commission to challenge such protectionist choices in the implementation of the Takeover Bids Directive, which were provided by the Takeover Bids Directive itself. Davies, Schuster and Van de Walle de Ghelcke, op cit, 143. For a different approach against the view that the implementation of Takeover Bids Directive followed a protectionist approach, see Jesper-Lau Hansen, “Cross-Border Restructuring – Company Law between Treaty Freedom and State Protectionism” in Ulf Bernitz and Wolf-Georg Ringe (eds), *Company Law and Economic Protectionism* (OUP 2010) 1186–190.

<sup>274</sup> Commission, “Application of Directive 2004/25/EC on takeover bids” COM (2012) 347, 3; Commission, “Report on the Implementation of the Directive on Takeover Bids” SEC (2007) 268.

<sup>275</sup> Commission, “Report on the Implementation of the Directive on Takeover Bids” SEC (2007) 268, 3; Frank S Benyon, *Direct Investment, National Champions and EU Treaty Freedoms* (Hart 2010) 69.

<sup>276</sup> Kraakman and others, op cit, 240.

permits it to consider protectionist political views, as long as the relevant EU and national rules are not infringed. The decision of the supervisory authority from determining whether it should grant a waiver could also be based on a prior screening of the foreign direct investment behind the takeover. That prior screening before the waiver is vulnerable to political and protectionist influences.

## **6.5 Shareholders Rights Directive II and screening of foreign direct investments**

The newly adopted Shareholders Rights Directive II (Directive 2017/828)<sup>277</sup> could also play a major role in this field. The Shareholders Rights Directive II seeks to achieve the following goals:

[T]o contribute to the long-term sustainability of EU companies, to create an attractive environment for shareholders and to enhance cross-border voting by improving the efficiency of the equity investment chain in order to contribute to growth, jobs creation and EU competitiveness. It also delivers on the commitment of the renewed strategy on the long-term financing of the European economy: it contributes to a more long-term perspective of shareholders which ensures better operating conditions for listed companies.

This requires the realisation of the following more specific objectives: 1) Increase the level and quality of engagement of asset owners and asset managers with their investee companies; 2) Create a better link between pay and performance of company directors; 3) Enhance transparency and shareholder oversight on related party transactions; 4) Ensure reliability and quality of advice of proxy advisors; 5) Facilitate transmission of cross-border information (including voting) across the investment chain in particular through shareholder identification.<sup>278</sup>

The goals that this Directive is pursuing also have important repercussions on screening a foreign investor, who holds shares in EU companies, sometimes through complex ownership structures involving intermediaries.

In this directive, there is a new provision for the identification of shareholders (art 3(a) of the Shareholders Rights Directive II), which could assist in the screening of foreign investors participating in the capital of EU companies.

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<sup>277</sup> Council Directive (EC) 2017/828 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement [2017] OJ L132/1–25; Tom Dijkhuizen, “Report from Europe: The Proposal for a Directive Amending the Shareholders Rights Directive” (2015) 12 ECL 45.

<sup>278</sup> Commission, “Proposal for a Directive of the European Parliament and of the Council amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement and Directive 2013/34/EU as regards certain elements of the corporate governance statement” COM (2014) 0213 final, 2.

More specifically, companies have the right to identify their own shareholders.<sup>279</sup> As a matter of fact, this new directive could help an EU company to see whether a foreign investor is hiding behind one of its own shareholders. With regard to the identification of a foreign investor hiding behind a shareholder of an EU company, there are also provisions obliging intermediaries holding the shares of the shareholder of an EU company to transmit specific information from the EU company to the shareholder (art 3(b) of the Shareholders Rights Directive II).<sup>280</sup> The exercise of shareholder rights is also facilitated: “Member States shall ensure that the intermediaries facilitate the exercise of the rights by the shareholder, including the right to participate and vote in general meetings” (art 3(c) of the Shareholders Rights Directive II). Hence, foreign investors, who are shareholders in EU companies, cannot hide behind intermediaries as easily as in the past.<sup>281</sup> Indirect sources of control over a company and the way this control is exercised, as well as the motives behind such control, could be identified and screened.<sup>282</sup> Some foreign investors, who are considered to be unwelcome in specific Member States, hold shares in EU companies of such Member States through complex

<sup>279</sup> Art 3(a) states that:

1. Member States shall ensure that companies have the right to identify their shareholders. Member States may provide for companies having a registered office on their territory to be only allowed to request the identification of shareholders holding more than a certain percentage of shares or voting rights. Such a percentage shall not exceed 0,5 %. 2. Member States shall ensure that, on the request of the company or of a third party nominated by the company, the intermediaries communicate without delay to the company the information regarding shareholder identity [...].

Peter Böckli and others, “European Company Law Experts (ECLE), Shareholder Engagement and Identification” (2015) 6–9 <<https://ssrn.com/abstract=2568741>>; Matteo Gargantini, “Barriers to shareholder identification and entitlement” in Hanne S Birkmose and Konstantinos Sergakis (eds), *Enforcing Shareholders’ Duties* (Elgar 2019) 214–35; Deirdre Ahern, “The Mythical Value of Voice and Stewardship in the EU Directive on Long-term Shareholder Engagement: Rights Do Not an Engaged Shareholder Make” (2018) 20 *CYELS* 88, 94–96; Corrado Malberti, “The Proposed Directive on the Encouragement of Long-Term Shareholder Engagement in European Listed Companies: A Critical Appraisal” in PM Vasudev and Susan Watson (eds), *Global Capital Markets* (Elgar 2017) 77–78; Andrew Johnston and Paige Morrow, “Commentary on the Shareholder Rights Directive” (2014) University of Oslo Faculty of Law Research Paper 2014-41, *Nordic & European Company Law Working Paper* 15-13, 5 <<https://ssrn.com/abstract=2535274>>. For a discussion on the risks of intermediation, see Louise Gullifer, “Ownership of Securities: The Problems Caused by Intermediation” in Louise Gullifer and Jennifer Payne (eds), *Intermediated Securities: Legal Problems and Practical Issues* (Hart 2010) 4–12.

<sup>280</sup> Art 3(b) states that:

1. Member States shall ensure that the intermediaries are required to transmit the following information, without delay, from the company to the shareholder or to a third party nominated by the shareholder: (a) the information which the company is required to provide to the shareholder, to enable the shareholder to exercise rights flowing from its shares, and which is directed to all shareholders in shares of that class; or (b) where the information referred to in point (a) is available to shareholders on the website of the company, a notice indicating where on the website that information can be found.

<sup>281</sup> A company has five core structural characteristics: 1) legal personality, 2) limited liability, 3) transferable shares, 4) centralised management with a board structure and 5) investor ownership. Sometimes, these characteristics make it difficult to discern the owners of a company and their interests. Kraakman and others, *op cit*, 5.

<sup>282</sup> Michael J Strauss, *Hostile Business and the Sovereign State* (Routledge 2019) 59.

chains of intermediaries, resulting in difficulties to identify them as shareholders of these EU companies. Disclosure of plans, intentions and shareholder engagement demand this identification of shareholders. Intermediaries cannot be used any more as a cover for an unwelcomed foreign investor holding shares in an EU company and are obliged to provide all information with regard to the identification of the foreign investor as shareholder.<sup>283</sup>

Additionally, Article 3(g) of the Shareholders Rights Directive II introduces the following engagement policy<sup>284</sup>:

[I]nstitutional investors and asset managers shall develop and publicly disclose an engagement policy that describes how they integrate shareholder engagement in their investment strategy” and “institutional investors and asset managers shall, on an annual basis, publicly disclose how their engagement policy has been implemented, including a general description of voting behaviour, an explanation of the most significant votes [...].

Such engagement policy could contribute to the screening of foreign investors holding shares in EU companies. Those foreign investors must disclose specific aspects of their plans for the investee company. There are also provisions for the disclosure of investment strategies of institutional investors and of arrangements with asset managers (art 3(h) of the Shareholders Rights Directive II)<sup>285</sup> and for transparency of asset managers (art 3(i) of the Shareholders Rights Directive

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<sup>283</sup> Recital 4 of the Preamble of Directive 2017/828 of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement [2017] OJ L132/1–25.

<sup>284</sup> Malberti, op cit, 76; Böckli and others, op cit, 1–5; Johnston and Morrow, op cit, 6–7; Andrew Johnston and Paige Morrow, “Towards Long-Termism in Corporate Governance: The Shareholder Rights Directive and Beyond” in Sigurt Vitols (ed), *Long-term investment and the Sustainable Company: a stakeholder perspective* (vol III, ETUI 2015) 22–26; Hanne Birkmose, “Forcing Shareholder Engagement: Theoretical Underpinning and Political Ambitions” (2018) 29 EBLRev 613; Hanne Birkmose, “European Challenges for Institutional Investor Engagement – Is Mandatory Disclosure the Way Forward” (2014) 11 ECFR 214; Iris Chiu, “Learning from the UK in the Proposed Shareholders’ Rights Directive 2014? European Corporate Governance Regulation from a UK Perspective” (2015) 114 ZVglRWiss 1, 25–36; Iris Chiu, “European Shareholder Rights Directive proposals: a critical analysis in mapping with the UK Stewardship Code?” (2016) 17 ERA Forum 31.

<sup>285</sup> Art 3(h) states that:

1. Member States shall ensure that institutional investors publicly disclose how the main elements of their equity investment strategy are consistent with the profile and duration of their liabilities, in particular long-term liabilities, and how they contribute to the medium to long-term performance of their assets. 2. Member States shall ensure that where an asset manager invests on behalf of an institutional investor, whether on a discretionary client-by-client basis or through a collective investment undertaking, the institutional investor publicly discloses the following information regarding its arrangement with the asset manager [...].

II).<sup>286</sup> These provisions could also constitute an effective method of screening foreign investors. A foreign investor, having set up an EU company and conducting business at the EU level through an EU company, must comply with the disclosure requirements of Shareholders Rights Directive II. The various plans and incentives of the foreign investor must be disclosed in the context of this harmonised framework. One of the main goals of this directive is the enhancement of the rules on “monitoring” investee companies and engagement by institutional investors and asset managers, which was often inadequate and focused excessively on short-term returns.<sup>287</sup> It is obvious that the goal also contributes significantly to screening foreign investors in EU companies.

Also, the Shareholders Rights Directive II has some new provisions on transparency and the approval of related party transactions. Article 9(c) of the Shareholders Rights Directive II is dedicated to transparency and the approval of related party transactions. Related party transactions are defined as follows: “transactions between a company and its management, directors, controlling entities or shareholders, [which] create the opportunity to obtain value belonging to the company to the detriment of shareholders, and in particular minority shareholders”.<sup>288</sup> The harmonised rules on related party transactions seek to address transactions among affiliated companies that quite often belong to the same group of companies, in which a company could be unfairly advantaged to the detriment of another company and of its shareholders raising issues with the fiduciary duties of directors.<sup>289</sup>

The problem with related party transactions is that shareholders are lacking adequate information in advance of planned transactions and quite often do not have any mechanisms allowing them to object to abusive related party transactions. The problem could be solved by enhancing the control rights over related party transactions, which would provide additional protection to minority shareholders.<sup>290</sup> Transparency and the approval of related party transactions

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<sup>286</sup> Art 3(i) states that:

1. Member States shall ensure that asset managers disclose, on an annual basis, to the institutional investor with which they have entered into the arrangements referred to in Article 3h how their investment strategy and implementation thereof complies with that arrangement and contributes to the medium to long-term performance of the assets of the institutional investor or of the fund [...].

<sup>287</sup> Recital 2 of the Preamble of Directive 2017/828 of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement [2017] OJ L132/1–25.

<sup>288</sup> Commission, “Proposal for a Directive amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement and Directive 2013/34/EU as regards certain elements of the corporate governance statement” COM (2014) 0213, 5.

<sup>289</sup> Marco Venturuzzo and others, *Comparative Corporate Law* (West Academic Publishing 2015) 343.

<sup>290</sup> Commission, “Proposal for a Directive amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement and Directive 2013/34/EU as regards certain elements of the corporate governance statement” COM (2014) 0213, 5.

are crucial for screening certain transactions between the investee subsidiary company and other subsidiaries of the foreign investor. Such provisions could restrict transactions planned by the foreign investor and aiming at technology transfer or asset stripping of its investee subsidiary company.<sup>291</sup> It should be stressed that these harmonised rights regarding related party transactions are provided only to shareholders. Member States, as such, or national authorities are not granted any harmonised rights regarding related party transactions, and they do not have a possibility to screen, as long as they are not shareholders.

## **6.6 Transparency in listed companies and screening of foreign direct investments: the role of EU capital markets law.**

In addition to the Shareholders Rights Directive II, the foreign investor should be obliged to provide certain information (e.g. information about major holdings), in accordance with the Transparency Directive (Directive 2004/109/EC<sup>292</sup>). The aims of the Transparency Directive are prescribed by Recitals 1 and 2 of its Preamble:

[t]he disclosure of accurate, comprehensive and timely information about security issuers builds sustained investor confidence and allows an informed assessment of their business performance and assets. This enhances both investor protection and market efficiency<sup>293</sup> and [t]o that end, security issuers should ensure appropriate transparency for investors through a regular flow of information.<sup>294</sup>

The Transparency Directive sets specific thresholds<sup>295</sup> and demands the Member States to impose on natural persons or legal entities the requirement to notify, in case of acquisition or disposal of a shareholding in a company, the proportion

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<sup>291</sup> Dan Prud'homme and others, "Forced technology transfer policies: Workings in China and strategic implications" (2018) 134 *Technological Forecasting and Social Change* 150; Dan Prud'homme and Max von Zedtwitz, "Managing 'forced' technology transfer in emerging markets: The case of China" (2019) 25 *J Intl Management*.

<sup>292</sup> Council Directive 2004/109/EC of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC [2004] OJ L390/38–57.

<sup>293</sup> Recital 1 of the Preamble of Directive 2004/109/EC of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC [2004] OJ L390/38–57.

<sup>294</sup> Recital 2 of the Preamble of Directive 2004/109/EC of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC [2004] OJ L390/38–57.

<sup>295</sup> Art 9 of the Transparency Directive sets the following thresholds of 5%, 10%, 15%, 20%, 25%, 30%, 50% and 75%. Sergakis, *op cit*, 121–22; Strauss, *op cit*, 61.

of voting rights held by them reaching, exceeding or falling below those specific thresholds.<sup>296</sup> This directive applies only to listed companies (arts 1(1)–(2)).

The importance of the criteria of shareholder composition and the changes with regard to major shareholdings play a very important role for investors' decisions affecting particular institutional investors and influencing the price of shares.<sup>297</sup> Knowing the identities of major shareholders provides investors with important information, for example, permitting them to evaluate the possibility of conflicts of interest.<sup>298</sup> The Transparency Directive contributes to further integration of EU capital markets through the reduction or elimination of information asymmetries and through the strengthening of investor confidence in the financial position of issuers.<sup>299</sup> The harmonised disclosure obligations seek to secure market efficiency and to assist issuers and shareholders to be informed on who exerts influence over issuers.<sup>300</sup> This provision of information combats the abuse of inside information. After the adoption of the Transparency Directive, investors who aimed to circumvent the Directive started using new types of financial instruments (e.g. derivatives) not covered by its disclosure rules. The danger with those new types of financial instruments was that investors could acquire stocks in companies, resulting in market abuse, and they could display a false and misleading situation of economic ownership and corporate control of listed companies. In 2013, the Transparency Directive was amended (art 13 of the Transparency Directive) to cover all instruments with similar economic effect

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<sup>296</sup> It should be mentioned that the Commission enacted an implementing Directive and a delegated Regulation as Level 2 acts of the Lamfalussy process. See Commission Directive 2007/14/EC of 8 March 2007 laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market [2007] OJ L69/27–36; Commission Delegated Regulation 2015/761 of 17 December 2014 supplementing Directive 2004/109/EC with regard to certain regulatory technical standards on major holdings [2015] OJ L120/2–5. These acts are very important for the screening process taking place under the Transparency Directive. Rüdiger Veil, “Disclosure of Major Holdings” in Rüdiger Veil (ed), *European Capital Markets Law* (2nd edn, Hart 2017) 391–431, 396, 399; Kraakman and others, *op cit*, 222; cf Michael C Schouten and Mathias M Siems, “The Evolution of Ownership Disclosure Rules Across Countries” (2010) 10 *JCLS* 451; Nis J Clausen and Karsten E Sørensen, “Disclosure of Major Shareholdings: A comparative analysis of the regulation in Europe” (2002) 4 *Int'l Comp Corp L J* 201.

<sup>297</sup> Veil, *op cit*, 396. For an analysis of the transparency issues of sovereign wealth funds in the context of the Transparency Directive, see Enrico Ginevra and Chiara Presciani, “Sovereign Wealth Fund Transparency and the European Rules on Institutional Investor Disclosure” (2017) 52 *Wake Forest L. Rev.* 815, 825–26, 829–32.

<sup>298</sup> Veil, *op cit*, 396.

<sup>299</sup> Commission, “Proposal for a Directive on the harmonization of transparency requirements with regard to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC” COM (2003) 138, 2

<sup>300</sup> Sergakis, *op cit*, 120.

to holding shares and entitlements to acquire shares, which ensures that issuers and investors have full knowledge of the structure of corporate ownership.<sup>301</sup>

The harmonised rules on the disclosure of major shareholdings play a very important role for the screening of foreign direct investments. The disclosure of any changes, with regard to major shareholdings, contributes to a careful screening of corporate ownership. The knowledge of shareholder composition allows both investors and supervisory authorities (EU and national) to carefully evaluate foreign direct investments that are financing the acquisition of shares in the capital of listed EU companies. An effective disclosure of major shareholdings could prove useful for national governments interested in screening any changes in the corporate ownership and control of their “national champions”, behind which an unwelcomed foreign investor is found.<sup>302</sup> In case of privatisations of State-owned companies, these disclosure obligations reveal the relationships of control appearing below the surface of legal ownership, which assist in the assessment of a company’s underlying interests and ensure that privatised activities are performed in line with State interests.<sup>303</sup>

Disclosure of major shareholdings revealing beneficial holders of shares also plays a very important role in the context of takeover bids. More specifically, the disclosure of major shareholdings assists the target company’s incumbent management in getting extra time, allowing them to design their defensive strategy, which is developed after the launch of the bid in board neutrality jurisdictions (with the permission of the general meeting of shareholders). It also enables the target company’s incumbent management to start adopting pre-bid defensive measures in jurisdictions without the board neutrality rule.<sup>304</sup>

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<sup>301</sup> Recital 9 of the Preamble of Directive 2013/50/EU of 22 October 2013 amending Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 2007/14/EC laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC [2013] OJ L294/13–27; Veil, *op cit*, 397. See also Pierre-Henri Conac, “Cash-settled derivatives (CSDS) as a takeover instrument and the reform of the EU Transparency Directive” in Hanne Birkmose, Mette Neville and Karsten E Sørensen (eds), *The European Financial Market in Transition* (Kluwer 2012) 49–68; Dirk A Zetzsche, “Against Mandatory Disclosure of Economic-only Positions Referenced to Shares of European Issuers – Twenty Arguments against the CESR Proposal” (2010) 11 EBOR 231; Strauss, *op cit*, 62–63.

<sup>302</sup> The disclosure rules of the Transparency Directive are aiming at making more difficult and costly creeping acquisitions. Creeping acquisitions constitute acquisition of a company’s *de facto* control, without the submission of a formal takeover bid. Nevertheless, these disclosure rules are insufficient to inhibit creeping acquisitions; see Luca Enriques and Matteo Gatti, “Creeping Acquisitions in Europe: Enabling Companies to be Better Safe than Sorry” (2015) 15 JCLS 55, 73–75. Control of a company could also be acquired by a creditor through pledged shares as collateral in a loan agreement, when the company does not comply with its obligations under the loan agreement and subsequently the creditor gets control of the collateral; see Strauss, *op cit*, 54–55, 64–65.

<sup>303</sup> Strauss, *op cit*, 64.

<sup>304</sup> Kraakman and others, *op cit*, 222.

Such obligation to disclose major shareholdings facilitates the screening of a foreign investor during the pre-bid period by the board of the target company. Nevertheless, an important disadvantage of Transparency Directive is that it does not oblige the shareholders to disclose their plan to acquire control nor their aim to launch a takeover bid. Only a few Member States, like France and Germany, have rules imposing a duty to disclose the goal to acquire a big amount of shares.<sup>305</sup> It is obvious that this disadvantage diminishes the efficiency of the Transparency Directive, with regard to screening the intentions of a foreign investor to acquire a large number of shares.

Some Member States moved beyond the disclosure obligations harmonised by the Transparency Directive. France and Germany, inspired by similar US rules, adopted additional disclosure obligations requiring an investor to disclose its intentions and its plans underpinning the acquisition of voting rights in a specific company.<sup>306</sup> Those intentions, which must be published by the issuer, include the plans to acquire control, procure additional shares or initiate whether it wishes to affect the appointment or removal of board members.<sup>307</sup> Hence, this obligation for investor's notification of intent requires a person to disclose its purposes with regard to future developments, corporate structure, business activities and other corporate and financial aspects of the issuer.<sup>308</sup> The Transparency Directive does not have provisions requiring such notification of intent. This lack of harmonised rules constitutes an important deficit of the process of screening a foreign investor at the EU level. Undoubtedly, such notification of an investor's intent constitutes an effective tool for monitoring the investor's plan and strategy towards a company. A foreign investor, who is obliged to notify his intentions on the company, could be assessed more comprehensively and with greater clarity. Empirical research reveals that reactions of market participants in capital markets are affected not only by the disclosure of acquisition of major shareholdings but also by the goals that the relevant investor wishes to achieve through the acquisition.<sup>309</sup> Member States wishing to screen the goals of a foreign investor could adopt such additional rules on notification of intent, like France and Germany. These additional rules would assist them in identifying the

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<sup>305</sup> Michael C Schouten, "The Case for Mandatory Ownership Disclosure" (2009) 15 *Stan. J.L. Bus. & Fin* 127, 136; Ginevra and Presciani, *op cit*, 826. For an analysis of motivations for acquiring control, see Strauss, *op cit*, 55–58.

<sup>306</sup> In US law, these disclosure obligations are described by art 13(d) of the Securities and Exchange Act, which were introduced by the 1968 Williams Act. These disclosure obligations on investors' notifications of intent are prescribed by art L.233-7 VII Code de Commerce and art 223-14 RG AMF in France and art 27(a) Wertpapierhandelsgesetz (WpHG) in Germany. Veil, *op cit*, 402, 424–25; Kraakman and others, *op cit*, 222; Sergakis, *op cit*, 126–27.

<sup>307</sup> Veil, *op cit*, 402.

<sup>308</sup> *Ibid* 424.

<sup>309</sup> Frederick C Scherr, Ashok Abbott and Upinder Dillon, "Returns to Target Shareholders from Initial Purchases of Common Shares: A Multivariate Analysis" (1993) 32 *Q J Bus Econ* 66; Veil, *op cit*, 424.

intentions behind an acquisition of shares by a foreign investor, which allows a screening of this foreign direct investment. In a future amendment of the Transparency Directive, a notification of intent could be added to the disclosure obligations to have a more transparent EU capital market.

## **6.7 Corporate restructuring harmonizing instruments and screening of foreign direct investments.**

Screening foreign direct investments could also take place through some corporate restructuring harmonising instruments. Such instruments could be used in the context of cross-border corporate restructuring to assist a foreign investor with acquiring control of a company. Public interest considerations could inhibit the completion of cross-border corporate restructuring. Member States enjoy discretion under the Cross-border Mergers Directive (repealed and consolidated into Directive 2017/1132) and the European Company Statute (SE) to block the process of a cross-border merger, the establishment of an SE by merger or the transfer of the registered office of an SE, when such processes are against public interest.<sup>310</sup>

A cross-border merger could be inhibited on the basis of public interest considerations. Article 121 of Directive 2017/1132<sup>311</sup> (ex art 4(1)(b) of the Cross-border Mergers Directive<sup>312</sup>), regulating conditions relating to cross-border mergers, states that:

The laws of a Member State enabling its national authorities to oppose a given internal merger on grounds of public interest shall also be applicable to a cross-border merger where at least one of the merging companies is subject to the law of that Member State. This provision shall not apply to the extent that Article 21 of Regulation (EC) No 139/2004 is applicable.

Hence, a foreign investor seeking to merge its EU company with a company from another Member State could be blocked by the relevant national authority, on the basis of public interest considerations. This provision is addressed mostly to strategic companies of Member States.

A foreign investor might be interested in acquiring the control of a company through the formation of an SE, an EU supranational corporate type introduced

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<sup>310</sup> For a discussion of the notion of public interest in the context of company law, see Ian B Lee, “The Role of the Public Interest in Corporate Law” in Claire A Hill and Brett H McDonnell (eds), *Research Handbook on the Economics of Corporate Law* (Elgar 2012) 106–29.

<sup>311</sup> Council Directive 2017/1132 of 14 June 2017 relating to certain aspects of company law [2017] OJ L169/46–127.

<sup>312</sup> Council Directive 2005/56/EC of 26 October 2005 on cross-border mergers of limited liability companies [2005] OJ L310/1–9.

by the European Company Statute.<sup>313</sup> The formation of an SE by merger could be prohibited by competent authorities of the Member States, on the grounds of public interest, which are subject to judicial review (art 19 of Regulation on the Statute for an SE). The opposition on public interest must be expressed before the issue of the certificate – referred to in Article 25(2) of Regulation on the Statute for an SE – and its judicial review is exercised by a national judicial authority, in accordance with national law. These public interest considerations are defined by national law, in accordance with the CJEU’s case law (Court of Justice of the European Union).<sup>314</sup> This provision could be quite useful for the protection of the financial sector; the national competent authorities could block the participation of their financial entities, such as banks or insurance companies, to the formation of an SE by merger in case there is a serious threat to their financial stability and to the interests of their stakeholders.<sup>315</sup> Nevertheless, opposition on public interest to the formation of an SE by merger might be circumvented if the participating companies decide not to merge but one of them acquires all the shares of the other.<sup>316</sup> Moreover, the transfer of the registered office of an SE is also subject to public interest considerations (arts 8(14) and 49 of Regulation on the Statute for an SE).<sup>317</sup>

It is obvious that cross-border mergers of companies, the establishment of an SE by merger and the transfer of the registered office of an SE could be hindered by the relevant authorities on the basis of public interest considerations. These public interest considerations are capable of restraining a foreign investor to

<sup>313</sup> Council Regulation (EC) 2157/2001 of 8 October 2001 on the Statute for a European Company (SE) [2001] OJ L294/1–21. For an empirical analysis, see Horst Eidenmüller, Andreas Engert and Lars Hornuf, “How Does the Market React to the Societas Europaea?” in Ulf Bernitz and Wolf-Georg Ringe (eds), *Company Law and Economic Protectionism* (OUP 2010) 334–48; Jodie Kirshner, “Empirical Notes on the Societas Europaea” in Ulf Bernitz and Wolf-Georg Ringe (eds), *Company Law and Economic Protectionism* (OUP 2010) 349–53.

<sup>314</sup> Christine Hodt Dickens, “Establishment of the SE Company: An Overview over the Provisions Governing the Formation of the European Company” (2017) 18 EBLRev 1423, 1437; Dirk van Gerven, “Provisions of Community law applicable to the Societas Europaea” in Dirk van Gerven and Paul Storm (eds), *The European Company* (vol 1, CUP 2006) 25–76, 38.

<sup>315</sup> *ibid.*

<sup>316</sup> Paul Storm, “The Societas Europaea: a new opportunity?” in Dirk van Gerven and Paul Storm (eds), *The European Company* (vol 1, CUP 2006) 3–24, 10.

<sup>317</sup> In case the foreign investor plans to materialize its investment through a European Cooperative Society (SCE), the same blocking power of Member States appears also in the Statute for a SCE (Regulation 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) [2003] OJ L207/1–24). This blocking power constitutes an effective screening mechanism, under which the Member State could intervene under public interest considerations into important decisions. Article 21 of the Statute for a SCE specifies the grounds for opposition to a merger and gives the possibility to a Member State to adopt national rules inhibiting one of its national cooperatives to participate in the formation of SCE through a merger only on grounds of public interest amenable to judicial review. Moreover, Article 7(14) of the Statute for a SCE allows Member States’ competent authorities to oppose the transfer of a registered office of an SCE registered in that Member State. The same provision refers also to cooperative financial institutions and states that: “*Where an SCE is supervised by a national financial supervisory authority according to Community directives, the right to oppose the change of registered office applies to this authority as well.*”

participate in the capital of a company (e.g. domestic public, private limited company or SE) and could constitute an effective screening mechanism against undesirable foreign investors. Such opposition rights of Member States constitute a deviation from investor ownership, for which rules of company law are designed.<sup>318</sup> Additionally, there is always a danger that these opposition rights of Member States, regarding cross-border mergers and European Companies (SEs), will result in protectionism. It is quite worrying that these opposition rights might be exercised in a protectionist way by national competent authorities. Interpretation of public interest by the CJEU's case law could certainly curb such possibility of protectionist practices.

## 6.8 Concluding remarks

In general, European Company law could play an important, but complementary, role in investment screening. More specifically, the harmonisation of company law at the EU level could contribute significantly to the screening of foreign direct investments. The Takeover Bids Directive, with its optionality and reciprocity regime, gives the Member States an opportunity to provide their national companies with a mechanism to screen a foreign direct investment. The Takeover Bids Directive's requirement for disclosure of information could also contribute to an effective screening of a foreign direct investment and, more specifically, to the screening of the foreign investor owning and controlling the bidder. Moreover, the Shareholders Rights Directive II could contribute to investment screening. The Transparency Directive, imposing transparency requirements on listed companies, may contribute to investment screening; thus, the disclosure of any changes, with regard to major shareholdings, contributes to a careful screening of the structure of corporate ownership. Screening foreign direct investments could also take place through some corporate restructuring harmonising instruments. More specifically, opposition rights of Member States – on the basis of public interest to block a cross-border merger, the establishment of an SE by merger or the transfer of the registered office of an SE – constitute an effective screening mechanism against a hostile foreign investor invoking these corporate restructuring provisions in the context of one of its EU subsidiaries.

Nevertheless, the primary goal of harmonising company laws at the EU level remains the promotion of the EU fundamental freedom of establishment and not the screening of foreign direct investments. The harmonisation of European company laws, in parallel with the realisation of its internal market objectives, allows the screening of foreign direct investments. National policymakers are advised to take advantage of the benefits and contributions of the harmonisation but must not rely exclusively on it. National policymakers are encouraged to adopt strong and effective specialised screening systems for foreign direct investments. Although the harmonisation of company laws could play an effective role in the screening of foreign direct investments, its role should not exceed

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<sup>318</sup> Kraakman and others, *op cit*, 14.

the limits of its discipline. Company law is an autonomous area of law with different objectives from international investment law, within which screening of foreign direct investments falls primarily. The role of the harmonisation of company law should remain complementary and supportive of a special legal framework, aiming at screening foreign direct investments. Additionally, through the harmonisation of European company law, there is always the risk of such investment screening resulting in protectionism. There is a danger these investment screening mechanisms provided by European company law to be abused and to lead to protectionist practices.

# Sammanfattningar på svenska

## **En ny industristrategi för EU**

av Katarina Engberg

EU har varit vant vid att omvärlden anpassat sig till de krav som ställs för att få tillträde till den inre marknaden – världens största. Men tänk om världen där ute inte längre anpassar sig till EU, utan EU måste anpassa sig till den? Detta är utgångspunkten för EU:s industristrategi, en av flera som publicerats de senaste åren.

Den geoekonomiska kampen mellan USA och Kinas underminerar det multinationella systemet, statligt subventionerade företag och IT-oligopol riskerar att snedvrider konkurrensen på den inre marknaden. Samtidigt har européerna själva inte gjort tillräckligt för att undanröja hinder för konkurrensen på den inre marknaden, en förutsättning för att kunna få fram globalt konkurrenskraftiga företag när den ekonomiska tyngdpunkten flyttas från Väst till Öst. Klimatförändringarna och digitaliseringen bidrar till förändringstrycket. Européerna sägs ha fem år på sig att genomföra de nödvändiga förändringarna med sina blandningar av offensiva och defensiva instrument, exempelvis en översyn av interna statsstödsregler, mekanismer för att granska utländska statssubventionerade bud och investeringar i kritisk infrastruktur, egna investeringar för att stärka EU:s strategiska och industriella autonomi.

Hur kommer detta att påverka konkurrenslagstiftningen och hur ska reglerna på den inre marknaden förhålla sig till dem som råder i övriga världen? Hur skapas lika regler på världsmarknaden?

## **EU:s industripolitik och den inre marknads regler och principer**

av Maria Wiberg

Den inre marknads funktion är grundläggande för utformningen av en europeisk industripolitik: när EU strävar efter att stärka sin konkurrenskraft och roll på den globala arenan med hjälp av en mer offensiv industripolitik behöver unionen nämligen hitta en balans mellan två mål som går stick i stäv med varandra. För EU gäller det således att navigera mellan ambitionen att flytta fram positionerna globalt och att se till att den inre marknaden fungerar som den är tänkt att göra. Den inre marknaden bygger på idén att fri rörlighet samt fri och rättvis konkurrens skapar rättvisa villkor för alla företag, som oavsett storlek och

finansiell styrka ska följa samma regler och ha lika möjligheter att konkurrera. Målet med industripolitik är tvärtom att offentliga interventioner ska förbättra företagens förutsättningar genom att den ekonomiska strukturen förändras till fördel för vissa sektorer, teknikområden eller uppgifter – vilket därigenom ska ge dem bättre utsikter att växa ekonomiskt. Inremarknadsregelverket ger utrymme för att man ska kunna hitta balansen mellan att stärka EU:s konkurrenskraft och att skydda den inre marknadens funktion. Det krävs dock en hänvisning till någon av de specifika undantagsgrunderna allmän ordning, hälsa och säkerhet, men inte till ett skydd av rent ekonomiska intressen.

Den stora utmaningen är att skapa en gemensam förståelse, samordning mellan och kunskap inom alla lokala, regionala, nationella och europeiska myndigheter och institutioner, vilket krävs för att industripolitiken ska fungera i samklang med inremarknadsregelverket, bli effektiv och nå de uppsatta målen. I den meningen är industripolitik till för att stärka EU:s konkurrenskraft och roll på den globala arenan.

## **Ska konkurrenslagstiftningen främja konkurrens eller konkurrenskraft?**

av Vladimir Bastidas Venegas

I det här bidraget utforskas skärningspunkten mellan EU:s konkurrenslagstiftning och den europeiska industripolitiken. Även om båda syftar till att stärka de europeiska företagens konkurrenskraft kan det finnas en spänning mellan att tillämpa konkurrensrätten och att nå de mål som eftersträvas med en europeisk industripolitik. Å ena sidan kan en alltför försiktig tillämpning av konkurrensrätten innebära att företag inte får tillräckligt starka incitament för att vässa sig i konkurrensen på den globala marknaden genom att hävda sig gentemot nya konkurrenter och satsa på innovation. Å andra sidan kan en alltför långtgående tillämpning av konkurrensrätten missgynna företag som satsar på effektivitet och konkurrenskraft, vilket därmed skulle motverka de industripolitiska målen. Den huvudsakliga slutsatsen är att de europeiska företagens konkurrenskraft knappast hålls tillbaka av den nuvarande tillämpningen av konkurrenslagstiftningen. Istället tycks det största problemet vara att konkurrensreglerna tillämpas i alltför liten utsträckning på digitala marknader. Den frågan kan dock inte lösas genom att andra politiska överväganden görs när konkurrensreglerna tillämpas på digitala marknader. Problemet kan istället lösas med en omtolkning av konkurrensreglerna. Det enda område där det kan vara relevant att uttryckligen göra en avvägning mellan konkurrensskydd och andra politiska överväganden är sammanslagningar där statskontrollerade bolag i länder utanför EU är inblandade. EU har dock redan de verktyg som behövs för att hantera sådana fall.

## **EU:s förbud mot statsstöd – tvångsjacka för en framgångsrik europeisk industripolitik?**

av Jörgen Hettne

När det gäller industripolitik har Europeiska unionen tilldelats relativt svaga befogenheter medan medlemsstaterna inte får bedriva nationell industripolitik med monetära medel, eftersom det kan snedvrیدا konkurrensen inom EU:s inre marknad. På världsmarknaden konkurrerar europeiska företag samtidigt med statsstödda företag från andra ekonomiskt starka regioner i världen, framför allt Kina, Japan och USA. EU:s framgångsrika inre marknad – med förbud mot statsstöd – kan därför bli ett hinder internationellt.

Argumentet i det här bidraget är att det finns ett glapp mellan omvärldsläget och de europeiska befogenheterna på området. Avsaknaden av en sammanhängande europeisk industripolitik riskerar att försvaga EU:s företag globalt och en långsiktigt hållbar strategi är därför viktigare än någonsin. Det gäller även nu när EU:s statsstödsregler har mjukats upp för att rädda likviditeten för de företag som drabbats hårt av coronapandemins ekonomiska följder. EU skulle vinna på en industripolitik som kan anpassas efter de geopolitiska förändringarna i världen, såsom brexit, den kinesiska transport- och infrastruktursatsningen BRI och USA:s merkantilistiska hållning i handelspolitiken. Slutsatsen är att en mer aggressiv europeisk industripolitik kan behövas när det regelbaserade internationella handelssystemet inte fungerar: om det saknas rättvisa villkor måste handelsstrategierna anpassas efter en ny verklighet.

## **EU och offentlig upphandling: använda verktygslådan på ett bättre sätt**

av Marta Andhov

Nästan 85 procent av EU:s marknad för offentlig upphandling är öppen för anbudsgivare från länder utanför EU. Däremot saknar många europeiska företag tillträde till upphandlingsmarknader utanför unionen, trots att de möter konkurrens från tredjeländer på EU:s inre marknad. Eftersom konkurrensen från företag i tredjeländ har ökat – vilket anses ha skapat orättvisa villkor på den inre marknaden – har Europeiska kommissionen utfärdat riktlinjer för anbudsgivare från tredjeländer som deltar på EU:s upphandlingsmarknad. För att åstadkomma rättvisa och lika spelregler har kommissionen två mål: för det första att se till att de instrument som finns att tillgå i EU:s lagstiftning om offentlig upphandling (hållbar offentlig upphandling och regler om onormalt låga anbud) verkligen används, så att samma eller likvärdiga krav ställs på leverantörer såväl inom som utanför EU. För det andra att förordningen om ett internationellt upphandlingsinstrument antas (IPI-förordningen). Om denna förordning antas kommer olika regler att gälla för företag inom respektive utanför EU.

Slutsatsen i den här analysen är att det sedan 2012 inte har funnits en tillräckligt stark politisk vilja i medlemsstaterna för att anta IPI-förordningen. EU:s befintliga regler för offentlig upphandling gör det ändå möjligt att skapa lika spelregler mellan alla företag som är verksamma på den inre marknaden, oavsett om de kommer från länder inom eller utanför EU. Förutsättningen är dock att det finns en politisk vilja och att den offentliga sektorn har den kompetens och kapacitet som krävs för detta.

### **Harmonisering av EU:s bolagsrätt som ett effektivt och kompletterande instrument för granskning av utländska direktinvesteringar**

av Thomas Papadopoulos

EU:s bolagsrätt skulle kunna fylla en kompletterande men effektiv funktion i systemet för granskning av investeringar, med hjälp av olika åtgärder för europeisk harmonisering. Den typen av harmoniseringsåtgärder etablerar instrument som kan användas för att fastställa och utvärdera en utländsk investerares identitet och avsikter i samband med ett bolagsförvärv, men även en portföljinvestering i ett bolag som är etablerat inom EU. Europeiska harmoniseringsåtgärder är obligatoriska att genomföra för medlemsstaterna. På så sätt blir de tillgängliga även i de medlemsstater som har valt att inte använda ett särskilt system för granskning av utländska direktinvesteringar. I de medlemsstater som redan har ett utvecklat system för granskning av utländska direktinvesteringar skulle harmoniseringsåtgärderna fylla en kompletterande funktion och därmed förbättra granskningssystemet genom att tillföra ytterligare information. De instrument som kan användas för att granska utländska direktinvesteringar är till för bolag inom EU och deras intressenter. Ibland ger de emellertid också befogenheter till medlemsstaternas tillsynsmyndigheter, som då skulle kunna blockera vissa sätt att gå tillväga och agera i näringslivet. Den här analysen fokuserar på företag inom EU kontrollerade av en investerare som kommer från ett land utanför EU och som drar nytta av etableringsfriheten.





”While attempting to promote Europe’s global competitiveness through an assertive industrial policy, the EU needs to secure a proper functioning of the Single Market, considering that the two may go in opposite directions.”



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